TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 532.

EDWARD S. BROWN, APPELLANT,

vs.

BENAJAH W. HIATT AND MARTHA ANN HIATT.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

FILED DECEMBER 3, 1872.

1 These further proceedings were had before the Honorable John F. Dillon & Hon. Mark W. Delahay, judges of the circuit court of the United States for the district of Kansas, and appear of record.

EDWARD S. BROWN, PLAINTIFF,
vs.
BENAJAH W. HIATT & MARTHA ANN HIATT, defendants, } No. 107.

The defendants having appealed from the decree rendered in this case, the 28th day of November, 1870, on the application of the plaintiff, a cross-appeal is allowed him from said decree to the Supreme Court of the United States; and on the 9th day of November he filed a citation with service thereof on the defendants, and his bond approved by the Hon. John F. Dillon, judge of said court, which appear of record in words & figures, to wit:

2 *Citation.*

The United States of America to B. W. Hiatt & Martha Ann Hiatt, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday of December next, pursuant to a cross-appeal obtained by Edward S. Brown, from a decree of the United States circuit court for the district of Kansas, rendered at the November term, 1870, of said court, wherein Edward S. Brown is appellant and you are appellees, to show cause, if any there be, why said decree rendered against said appellant should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John F. Dillon, judge of the eighth circuit, at Topeka, in the district of Kansas, this 28th day of May, in the year of our Lord one thousand eight hundred & seventy-two.

JNO. F. DILLON, [SEAL.
Circuit Judge.

I, H. Griswold, counsel for B. W. Hiatt & Martha Ann Hiatt, in the circuit court of the United States for the district of Kansas, do hereby on the 29th May, 1872, acknowledge service of the within citation by copy of the same this day delivered to me.

H. GRISWOLD,
Counsel for B. W. Hiatt & Martha Ann Hiatt.

3 Subscribed and acknowledged before me this 29 day of May, 1872.

A. S. THOMAS, *Clerk.*

(Endorsed:) Filed Nov. 9, 1872. A. S. Thomas, clerk.

4 *Bond.*

Know all men by these presents that we, Edward S. Brown, John B. Winfree, & H. T. Green, are held & firmly bound unto B. W. Hiatt and Martha Ann Hiatt, in the full & just sum of two hundred dollars, to be paid to the said B. W. Hiatt & Martha Ann Hiatt, their certain attorney, executors, administrators, or assigns; to which payment well and

truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this 28th day of May, in the year of our Lord one thousand eight hundred & seventy-two.

Whereas, lately, at the November term, 1870, of the United States circuit court for the district of Kansas, in a suit depending in said court between Edward S. Brown, plaintiff, & B. W. Hiatt & Martha Ann Hiatt, defendants, a decree was rendered, in some respects against the defendants and in other respects against the plaintiffs, & said defendants having obtained an appeal, & having removed said cause to the Supreme Court of the United States, and having filed a transcript of the record in said cause in the office of the clerk of the Supreme Court to reverse said decree; & whereas, Edward S. Brown, the plaintiff in said suit, has also obtained a cross-appeal to reverse said
5 decree in certain respects in which he alleges that he has been aggrieved; and the said Edward S. Brown having obtained a cross-appeal and a citation directed to the said B. W. Hiatt & Martha Ann Hiatt, them citing and admonishing to be and appear at a Supreme Court of the United States to be holden at Washington, the first Monday of December next:

Now, the condition of the above obligation is such, that if the said Edward S. Brown shall prosecute his said cross-appeal to effect, & answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force & virtue.

EDWARD S. BROWN. [SEAL.]
JOHN B. WINFREE. [SEAL.]
By ED. S. BROWN, *Att'y in fact.*
H. T. GREEN, [SEAL.]

Approved by—

JOHN F. DILLON, *Circuit Judge.*

Know all men by these presents that I, John B. Winfree, do hereby constitute & appoint Edward S. Brown my true & lawful attorney, for me & in my name, as surety for Edward S. Brown, to sign, seal, & deliver such bond or bonds as may be required from him in taking an appeal to the Supreme Court of the United States from a decree rendered by the United States circuit court for the district of Kan-
6 sas, at the November term, 1870, in the case of Edward S. Brown, plaintiff, against B. W. Hiatt and Martha Ann Hiatt, defendants; and I do hereby ratify & confirm all the acts and doings of my said attorney, and do make them as valid and binding as if were personally present doing the same.

In testimony whereof, I do hereunto set my hand and affix my seal this 22 day of May, 1872.

JOHN B. WINFREE. [SEAL.]

STATE OF VIRGINIA, *City of Lynchburg, to wit:*

I, W. C. Ivey, notary public in & for said city, in the State of Virginia, do hereby certify that John B. Winfree, whose name is signed to the foregoing power of attorney, is personally known to me; is a resident of this city, and he personally appeared before me, in said city, this day, and acknowledged said power of attorney to be his act & deed for the purposes therein mentioned; and said John B. Winfree justified on oath to his sufficiency as surety in the bonds required to be executed by Edward S. Brown in taking the appeal in the power of attorney mentioned.

In testimony whereof, I have hereunto set my hand and affixed my notarial seal this 22 May, 1872.

[SEAL.] W'M C. IVEY, *N. P.*

7 UNITED STATES OF AMERICA,
District of Kansas, ss:

I, A. S. Thomas, clerk of the district court of the United States of America, for the district of Kansas, do hereby certify the foregoing to be a true, full, and perfect copy of the proceedings in said court had on the cross-appeal taken by the plaintiff in the case of Edward S. Brown, plaintiff, vs. Benajah W. Hiatt & Martha Ann Hiatt, defendants, as the originals appear and remain in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Topeka, in said district of Kansas, this 26th day of November, A. D. 1872.

[SEAL.] A. S. THOMAS, *Clerk.*

(Indorsement on cover:) No. 532. Edward S. Brown, appellant, vs. Benajah W. Hiatt & Martha Ann Hiatt. Kansas C. C. U. S. Filed 3d December, 1872.

Supreme Court of United States.

DECEMBER TERM 1872:

No. 95 and No. 532.

Benajah W. Hiatt and Martha Ann Hiatt, *Appellants*, vs. Edward S. Brown, *Appellee*.	Appeal from Decree of the Circuit Court of the United States for the District of Kansas.
Edward S. Brown, *Appellant*, vs. Benajah W. Hiatt and Martha Ann Hiatt, *Appellees*.	Cross Appeal in same Case.

Bryant & Browne, Printers, Lynchburg, Va.

Supreme Court of United States.

DECEMBER TERM 1872:

No. 95 and No. 532.

Benajah W. Hiatt and Martha Ann Hiatt, *Appellants*, *vs.* Edward S. Brown, *Appellee*.	Appeal from Decree of the Circuit Court of the United States for the District of Kansas.
Edward S. Brown, *Appellant*, *vs.* Benajah W. Hiatt and Martha Ann Hiatt, *Appellees*.	Cross Appeal in same Case.

Abstract of the Case.

On the 29th of May, 1860, Benajah W. Hiatt and Martha Ann Hiatt, who resided in Leavenworth county, Kansas, borrowed from Edward S. Brown, then in Kansas, but who resided in Cumberland county, Virginia, $2,000. The rate of interest agreed between them was 20 per cent. per annum; which was then the lawful rate of interest in Kansas. They executed to him their bond for $2,400 00, including therein one year's interest, payable 12 months after date, with interest from maturity, at 20 per cent. per annum—pp. 2 and 15. Simultaneously with the execution of said bond, to secure the payment thereof, they executed to him their mortgage conveying the East half of sec. 22, Township 9, Range 20, lying in Leavenworth county, Kansas—pp. 15, 16—and as further security, collateral to said mortgage, Benajah W. Hiatt assigned to him—pp. 18 and 53—a mortgage executed to said Hiatt by John H. Kenyon and wife to secure two promissory notes: one for $400 00, which had been previously paid off and discharged—p. 53: the other for $800,

dated 11th December, 1858, payable 25th December, 1860, bearing 6 per cent. interest from date, subject to a credit of $75 00, paid to said Hiatt 7th Feb., 1860—pp. 17, 18. The land conveyed in Kenyon's mortgage was also in Leavenworth county, Kansas; and as further security, collateral to the mortgage executed by Benajah W. Hiatt and Martha Ann Hiatt, to Edward S. Brown, Benajah W. Hiatt assigned to him—p. 55—a judgment he had recovered against George W. Perkins, in the District Court of the United States for the District of Kansas, the 6th of June, 1859, for $763 13 and costs; which debt was said to be secured by a lien on a lot in the city of Leavenworth, Kansas—pp. 54, 55. This assignment is absolute on its face; but it is admitted by all parties, that it was a collateral security.

The mortgage executed by Benajah W. Hiatt and Martha Ann Hiatt, having been recorded was together with the bond for $2,400 00, and Kenyon's mortgage and his note for $800 with the credit of $75 00 endorsed thereon, carried, a few days after said bond and the mortgage to secure the same were executed, by Edward S. Brown, to his home in Virginia; and there retained by him in his exclusive possession until Sept., 1865. His home, where he remained during the war, was within that portion of Virginia which was by the several proclamations of the President, declared to be in insurrection. Hiatt and wife continued to reside in Kansas; and between them and Brown there was no intercourse after May, 1861, until the termination of the war.

At the time of the loan to Hiatt and wife it was agreed that as Brown resided in Virginia, and would take with him the Kenyon note and mortgage, that Hiatt would keep such oversight of these collaterals as should be necessary to preserve them for the purposes to which they had been appropriated; so that resort might be had to them, if the mortgage on their land should turn out an insufficient security. See answers to 3d question, p. 26, transcript p. 79 and 8th and 13th questions, p. 27.

Before the war several letters passed between Brown and Hiatt, or Hiatt's attorneys.

In the latter part of 1860, Hiatt directed his attorneys to have the lot in Leavenworth sold under the judgment, and bought in in the name of Brown—pp. 44, 45. Brown in a letter of the 14th of January, 1861, to those attorneys, states that Hiatt assigned the judgment "*as collateral security* to a mortgage by himself and wife to secure a debt of $2,400 00," and asked to be informed "when the property is sold"—p. 45—see Callahan's statement—p. 59. Hiatt's attorneys in their reply to Brown of the 31st January, 1861, say, that it was sold on the 16th, and purchased by them as his attorneys, under Hiatt's direction; they considering it for his "and Hiatt's interest to bid it in so that" they "could collect the rent and take steps to secure the property," and considering the property "a much *better security* than the decree of foreclosure"—pp. 45, 46.

On the 11th of April, 1861, Benajah W. Hiatt wrote to Edward S. Brown—Exhibit D.—"I also have had the mortgage closed in Leavenworth on the Perkins house and lot, and bought it in, and how shall that be arranged, * * * I could sell my half-section for 20 dollars per acre; but would rather keep it than to take that. I now have a good prospect of paying off the mortgage on it when it comes due. * * * I shall probably work on a contract in Pennsylvania this summer, and the proceeds I intend to pay thee on that mortgage."

On the 15th April, 1861, Edward S. Brown wrote to Benajah W. Hiatt—Exhibit E. p. 19.—"Let me know how stands the judgment *vs.* G. W. Perkins. If the sale of the property is confirmed, and it be bought in, the deed of conveyance, if it can be so arranged, had better shew on its face our understanding that this is collateral security together with the mortgage, which you and Mrs. Hiatt gave on the land of yourself and Mrs. Hiatt to me, which is to be released when the bond and interest is paid."

On the 4th May, 1861—Exhibit F. p. 19—Benajah W. Hiatt wrote to Edward S. Brown, acknowledging that he had received his letter of the 15th of April, and saying: "The sale of the Perkins property is not confirmed yet * * could not as yet pay the costs of sale, &c. It is not, however, returned yet, and I will pay the costs if possible, which is about 70 dollars * * John H. Kenyon is ready to renew his mortgage and note for 20 per cent., which I want done as it will save me paying 10 per cent. out of my own pocket, which will be quite an item in these hard times. Send the papers to some attorney here and have them arranged as that was our agreement, and then friend Brown his note has been due ever since Christmas and only drawing 10 per cent., and me paying thee 20."

On the 20th May, 1861, Edward S. Brown wrote to Benajah W. Hiatt, and enclosed a paper to be signed by John H. Kenyon binding himself to pay to Benajah W. Hiatt, in consideration of further indulgence, 20 per cent. interest instead of 6 on the note of $800 00 after its maturity—Exhibits G. & H., pp. 18, 19.

With these communications intercourse between them terminated until after the war.

In the early part of 1863, while Brown was cut off from intercourse with all persons in Kansas, and knew nothing of what was there occurring, Benajah W. Hiatt went to the office of Robert Crozier, in the city of Leavenworth,—see Robert Crozier's deposition, p. 35—and reported to him as United States District Attorney for the District of Kansas, that he owed Brown a considerable sum of money secured by mortgage upon the farm on which he then lived, that many other mortgages were held by Brown on lands in Leavenworth and Atchison counties, Kansas, that these were subject to confiscation (which was not true) and "*that he owed Brown the amount of money the mortgage was given to secure;* but that he would much rather pay it to the Government than to Brown."

Proceedings were then instituted by said District Attorney, under Act of Congress of the 17th July, 1862, to confiscate the bond and mortgage executed by Hiatt and wife to Brown together with other bonds and mortgages. To the information Hiatt and wife filed their answer, verified by affirmation, wherein they said, p. 46, transcript p. 142, "that they are not, and have not been at any time since, on or about the day of May, 1861, indebted to the said Edward S. Brown, on said bond and mortgage in any sense whatever." They also said, that at the time said bond and mortgage were executed, it was agreed that the debt from Perkins and the debt from Kenyon should be taken in full satisfaction of said bond and mortgage, and so the "respondents aver, that said bond and mortgage have in the manner aforesaid been fully paid and satisfied."

This answer having been filed, the court on the 5th June, 1863, decreed, pp. 48, 49, "that as to the bond for the payment of $2,400 00 in twelve months after the date thereof, with interest after maturity, at the rate of 20 per cent. per annum, executed May 29th, 1860, by Benajah W. and Martha Ann Hiatt to said Edward S. Brown, and recorded in the office of the Register of deeds of Leavenworth county, Kansas, May 29th, 1860, in book "L," page 476, on the following real estate in said Leavenworth county, viz: the East half of section 22, in township 9, of Range 20, in the information in this cause described, this cause and the information herein be, and the same is hereby, *dismissed without prejudice*."

Prior to the filing of said answer in the confiscation case, the claim against Perkins had become utterly worthless. He was insolvent, and the lot conveyed in the mortgage to Hiatt, had been subjected to a prior lien which exhausted the proceeds of sale—see agreed statement, p. 52.

On the 10th of September, 1863, proceedings were instituted to confiscate the note of Kenyon to Hiatt for $800—p. 49. The warrant commanded the Marshal to attach said

note and mortgage, rights, credits and all the interest therein belonging to said Edward S. Brown—p. 50.

On the 19th of October, 1863, the Marshal returned, that he had "attached, arrested and detained the following note and rights, property, credit and effect of Edward S. Brown, to-wit: a note for $800 00, given by John S. Kenyon to Benajah W. Hiatt, dated December 11, 1858, payable Sept. 25, 1860, with 6 per cent. per annum int. from date and assigned to Edward S. Brown, May 29, 1860, secured by mortgage, * * * and have cited and notified Benajah W. Hiatt, Martha Ann Hiatt, John H. Kenyon, Anestha W. Kenyon, Lewis F. Arberg and Herman A. Arburg, and all other persons, having or pretending to have any right, title, or interest therein"—p. 50.

There was no appearance by any one. There was no condemnation of forfeiture as to the note, or any thing else. There was no finding by a jury and no finding by the Court of any thing, except, that John H. Kenyon owed $1,037 00—not finding to whom he owed it. The Court entered the default of John H. Kenyon and Anestha Kenyon his wife; but of no one else, and ordered the information to be taken as confessed by them; but by no one else; and ordered John H. Kenyon to pay said money into Court within three months from date of decree, (19th November, 1863,) and in default of such payment, that his mortgage be foreclosed, and the land therein conveyed be sold. See decree, p. 51.

The return of the Marshal, that he had attached, arrested and detained the note was not true. Benajah W. Hiatt and Martha Ann Hiatt knew that Brown had them in his possession in Virginia. They say in their answer—p. 21, transcript p. 63—that the complainant Brown "did thereupon, (29th May, 1860,) receive said Kenyon note, the same being endorsed to him, and said Kenyon mortgage, *and has ever since had the same.*"

On the 27th of Feb., 1867, this suit was instituted by Brown, against Benajah W. Hiatt and Martha Ann Hiatt, in

the Circuit Court of the United States for the District of Kansas, to foreclose the mortgage given by them to secure the payment of the bond for $2,400 00.

In their answer, in the Court below, they relied on several defences:

1. The State statute of limitations, which requires an action on an agreement, contract or promise in writing to be brought within three years, after the cause of action accrues; and they denied that the time during the war should be excluded from the computation—p. 23, transcript p. 70.

2. That at the time they executed the bond and the mortgage, they reserved the right to make an election, at any time thereafter, that Brown should take the judgment against Perkins and the note of Kenyon for $800 00, in full satisfaction of the bond for $2,400 00, that in pursuance of this reserved right, they made this election in 1862, addressed a letter to Brown, informing him of said election, and received from him a letter saying, he did thenceforth hold the same as his property in satisfaction and discharge of said bond for $2,400 00, that they had this letter before the court and used it as evidence; but had lost it, and could not find it.—pp. 22, 23.

3. That in the confiscation suit they had answered, particularly alleging that said note for $2,400 00 had been paid and satisfied * * and thereupon said suit was by said court dismissed as to these defendants, and in the same suit or proceeding, the said debt against said Kenyon was confiscated by the judgment of said Court to the United States as the property of the complainant."—p. 23.

To this answer there was a general replication.—p. 25.

Depositions were taken; and it was proved, that Brown resided, at the breaking out of the war, in that portion of Virginia which was declared to be in insurrection, and remained at his home during the war. See question 24 and answer thereto—p. 30—that there was no agreement that at the election of Hiatt and wife; or either of them, that

Brown should take the Kenyon note, and the judgment against Perkins, or the lot mortgaged to secure that debt, in satisfaction of the bond of $2,400 00 in full or in part. Question 14, and answer thereto—p. 28—that he never received any letter informing him, that Hiatt and wife, or either of them, had made an election for him to take the Kenyon note and the Perkins judgment, or lot in satisfaction of the bond for the $2,400 00, and never wrote to them, or either of them, expressing his willingness to do so; questions 15 and 16 and answers thereto—p. 28—that the last letter he received from B. W. Hiatt was dated 4th May, 1861, and the last he ever wrote to him was dated 29th May, 1861; question 19 and answer thereto—p. 29—see the letters—pp. 19, 20.

In the deposition of Benajah W. Hiatt, on cross-examination—p. 40—he is asked to give, as near as he can, "what he wrote in that letter" to Brown. He answers that "the substance was, that I wanted him to take the Perkins and Kenyon's claims as agreed." He is then asked to state the language of the reply, and he answers, "I never received an answer from him to that letter." He is further asked about the letter which he said he had received, and which was read in court at Topeka, and he answered, "he simply stated in that letter, that he was willing to settle with me according to our agreement and would do so as soon as he could. He said that he was willing to release our property (the farm) that we lived on, and take the Perkins and Kenyon property as we had agreed before." p. 41. He is asked how late he had written to Brown, acknowledging this debt (bond for $2,400 00) and answered, "I cannot tell anything about it." He is asked "when and where he made enquiry of H. T. Green in relation to paying the Brown debt," and answered, "I went to him after the rebellion commenced as I could get no letter from Brown."

In the deposition of Mrs. Hiatt, p. 42, she says, "I know that Mr. Hiatt gave other securities to Plaintiff besides the

mortgage upon our land—a mortgage of $800 00 against John H. Kenyon and the Perkins' property in the city of Leavenworth. Mr. Brown agreed to take said Perkins and Kenyon's claims, at any time Mr. Hiatt said so, and release our mortgage to him. My husband wrote a letter to Mr. Brown in relation to his taking those claims. I am not certain whether I saw the letter, or whether he told me he had written it. I think it was in the Summer of 1862, but am not sure. He received an answer from Mr. Brown, Plaintiff: I saw it." She was asked to state the contents of that letter, and answered, "Plaintiff said in his letter, that I spoke of, that he would take those claims at any time, and release the mortgage we gave; that he simply wanted the mortgage on our place as collateral security."

In the deposition of H. T. Green—pp. 56, 57, he details the circumstances under which he aided Benajah W. Hiatt in procuring the loan from Brown—his knowledge of the securities given for the re-payment—the mortgage on the 320 acres, Kenyon's note and the judgment against Perkins; that he had frequent conversations with said Hiatt, and he never said "any thing about any agreement between them that Brown was to take any of said securities in satisfaction of the bond for said loan until long after the confiscation suits had been instituted."

In the deposition of John H. Kenyon, which has been supplied in obedience to the writ of certiorari, he says he resided until the fall of 1862 in the same neighborhood with Hiatt: had frequent conversations with him about his note to Hiatt for $800 00, and Hiatt's bond to Brown for $2,400; that he never heard from Hiatt of any agreement that Brown would take the note of $800 00 in payment; but Hiatt always said it was held as collateral security to his (Hiatt's) mortgage to secure the payment of the bond for $2,400; that he never heard Hiatt say any thing about getting a letter from Brown after the war commenced; but heard him say that Brown was in the South, and that he would not be able to correspond with him.

On the hearing of the cause, on the 28th November, 1870, the court below found the issues for the complainant, and that the defendants were entitled to a credit for Kenyon's note of $800 00, less $75 paid thereon, and that the plaintiff was entitled to $3,037 50 after crediting the Kenyon note at the date of the confiscation of the same, as set forth in the answer of said defendants, being the sum of $955 00, and decreed that the complainant recover from the defendants $3,037 50, with interest thereon at 12 per centum per annum from date of the decree till paid, and in default thereof, that the mortgage be foreclosed.—pp. 67, 68.

Points on which Decree is right.

I. The court below was right in holding that the plaintiff was not barred by the statute of limitations; that between the plaintiff and the defendants, who resided on different sides of the belligerant lines, the time which elapsed during the war is to be deducted from computation, in calculating the period at which his right of action is barred.

This question is now well settled by the decisions of the Supreme Court. *Hanger* vs. *Abbott*, 6 Wall, 532; *United States* vs. *Anderson*, 9 Wall, 56; *Levy* vs. *Stewart*, 11 Wall, 244; *Stewart* vs. *Kahn*, 11 Wall, 493; *Protector*, 9 Wall, 687, and 12 Wall, 700.

The argument of Judge Dillon, who decided this case in the Court below, (see Dillon's Circuit Court Reports, p. 372,) before several cases cited above were decided in the Supreme Court, with a uniform current of authorities cited by him, is not only exhaustive, but perfectly conclusive of the question, that the time which elapsed during the war must be deducted from the computation in finding the period at which the statute of limitations becomes a bar between creditor and debtor on opposite sides of the belligerant lines.

II. The Court below was right in holding that the defendants had not paid the bond of $2,400 00, with interest from the 29th of May, 1861.

First: Parol testimony of the agreement between the parties, though much stronger than that offered in this case, was not competent evidence. The bond and mortgage—p. 15—stood higher in the scale than any parol testimony.—*Davis* vs. *Symonds*, 1 Cox, 404; *Haynes* vs. *Hare* 1 H. Bl., 659; *Rich* vs. *Jackson*, 4 Brown's, C. R., 519; *Mumford* vs. *McPherson*, 1 Johns. Rep., 418; *Erwin* vs. *Saunders*, 1 Cow., 250; *Huston* vs. *Sawyer*, 9 Id., 41; *Williams* vs. *Jones*, Barn. & Cress, 108, 11 Eng. C. L.; *Potter* vs. *Yale College*, 8 Conn. 62. The authorities clearly show that, there being a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties, either before or after the instrument was made, or during the time that it was in a state of preparation, so as to add to or substract from, or in any manner to vary or qualify the written contract.—*Goss* vs. *Ld. Nugent*, 5 Barn. & Adol., 64, 27 Eng. C. L.; *Smith* vs. *Jeffreys*, 15 M. & W. 564; *Hotson* vs. *Browne*, 9 Com. B. (J. Scott,) N. S., 442, 99 Eng. C. L.; *Towner* vs. *Lucas*, 13 Grat. 705; *Woodward* vs. *Foster*, 18 Id, 204.

The wisdom of this rule is strikingly vindicated by what appears in this record.

Second: The averment in the answer, that it was agreed at the time of making the loan, executing the mortgage and assigning the collaterals, that the debtors might, at their pleasure, make an election for the creditor to take the two collaterals in full satisfaction of the bond; that they made this election in 1862, wrote to the creditor and got a letter from him accepting these collaterals in full satisfaction of the bond is in the highest degree improbable; and not to be credited unless sustained by competent testimony.

The amount of the two collaterals at the time of making the loans, taken at their face value, was $1,511 53. They were collateral security in addition to the mortgage to secure the payment of a bond given for a cash loan of $2,000 00. The cash lent exceeded the amount of the collaterals by

$488 47. The loan bore 20 per cent. One of the collaterals, Kenyon's note, bore 6 per cent., the other, the judgment against Perkins, bore 7 per cent. interest. The excess of the loan over the collaterals was rapidly increasing. An agreement to take these collaterals for the cash lent on the day of making the loan, or for the bond, in 1862, when the difference was much greater, and the bond secured by a mortgage on a valuable tract of land and the collaterals in addition, would not have been made except by a person *non compos mentis.* The agreement averred, is denied positively—see question and answer 14 p. 28. That the creditor wrote a letter agreeing to take said collaterals in satisfaction of the bond is positively denied—see questions and answers 15 and 16, p. 28. The cross-examination of Benajah W. Hiatt—p. 41—in which he says he could get no letter from Brown, and the testimony of Mrs. Hiatt, that she saw the letter, and Brown said "*he simply wanted the mortgage on our place as collateral security,*" contradicts the averment.

The answer of Mr. and Mrs. Hiatt, under solemn affirmation, for they are Quakers, and do not swear, fixes the time when this pretended letter was written, agreeing to take the collaterals in satisfaction of the bond, in 1862—p. 22, transcript p. 67. Mrs. Hiatt thinks it was in 1862—p. 42—yet Hiatt in 1863, informed Crozier, the U. S. Attorney, that he "*owed Brown a considerable sum of money*"—p. 35. In their answer in the confiscation suit, they say *they have not been indebted to the said Edward S. Brown on said bond and mortgage in any sense whatever since on or about the day of May,* 1861—p. 46. These statements contradict the averment about the letter, and they contradict each other. In Hiatt's letter of 11th April, 1861, he says that on his mortgage to Brown he intends to pay the proceeds of a contract in Pennsylvania, on which he would probably work in the summer—p. 18—and in his letter of the 4th of May, 1861, he makes arrangement with Brown for Kenyon's note to be placed on a footing to bear as high a rate of interest for him,

Hiatt, as he, Hiatt, was paying to Brown—pp. 19, 20. In those letters, coming up to the commencement of the war, he makes no allusion to any agreement by which he might at his election, discharge his bond with Kenyon's note and the judgment against Perkins; but the arrangements, in said letters contemplated, are inconsistent with the agreement averred. This pretended agreement to take Kenyon's note and the judgment against Perkins, in satisfaction of the bond of $2,400 00, is contradicted by the testimony of Green—pp. 56, 57—the testimony of Kenyon (returned in obedience to the writ of certiorari) the testimony of Brown—p. 28—answers to questions 14, 15, 16.

In 1862 the judgment against Perkins became worthless from the establishment of Cockerill's prior lien—p. 52. Then for Hiatt to have written to his creditor proposing to give him the judgment against Perkins in payment on his bond, concealing the fact that it had become worthless, would have been a fraud which a court of equity will not countenance.

In 1862 intercourse between the debtors and the creditor was prohibited. The correspondence and the agreement which they seek to establish would have been illegal and void—see *United States* vs. *Grossmayer*, 9 Wall, 72. The failure to produce the letter which they pretend to have received from the creditor in 1862 is a significant circumstance; the court below was well justified in finding for the plaintiff on the issue of payment.

Errors Assigned on Cross-Appeal.

1. It was error to credit to Benajah W. Hiatt and Martha Ann Hiatt, on their bond for $2,400 00 the $955 00, amount of Kenyon's note at the time it was alleged to have been confiscated.

2. It was error to decree only $3,037 50 to Brown. The true amount due 28th November, 1870, when decree was rendered was $6,958 57; but if $955, amount of Kenyon's

note, be credited the 19th November, 1863, when it was alleged to be confiscated, then the amount due (the accruing interest exceeding said credit), would be $6,003 57.

The decree should have been for $6,958 57 and interest thereon at 12 per cent. per annum, from date of decree, 'till paid, and costs.

Points and Authorities.

1. It was error to credit $955 00, amount of Kenyon's note at time of alleged confiscation.

Whose right or title in Kenyon's note was sought to be confiscated? Was it that of Brown, the appellant in the cross-appeal? If so, let us enquire what were his rights. Kenyon's note and mortgage were placed in his hands as collateral security, in addition to Hiatt's mortgage to secure the payment of the bond for $2,400 00. If Hiatt, from the proceeds of his work on the contract in Pennsylvania in the summer of 1861—p. 18, transcript p. 54—or from any other source, had paid his bond, then his mortgage to Brown would have been redeemed; and his rights as Kenyon's creditor and mortgagee, would have been redeemed from the assignment to Brown. Brown's rights in Kenyon's note and mortgage appeared of record, as well as his rights in Hiatt's bond and mortgage—pp. 52, 53.

In both he held a trust: to both he could resort on default in paying the bond of $2,400; but until such default, Kenyon's note and mortgage remained a mere collateral security. If Hiatt had become bankrupt or insolvent his assignees in bankruptcy or insolvency could have had from both or either only such surplus as would remain after paying the bond of $2,400. *Scott* vs. *Surman*, Willes, 400; *Carpenter* vs. *Morrell*, 3 Bos. and Pul., 40; *Parnham* vs. *Hurst*, 8 M. and W., 743. So if Brown had become bankrupt or insolvent, his assignees could only take because of his right to that same bond; and whatever arose from the collateral securities would, so far as

not required to pay that bond, belong to Hiatt or his assignees. It is not to be maintained that there could be confiscated as Brown's property, that which if he had become bankrupt or insolvent would *not* have gone to his assignees.

Brown could take no benefit from the Kenyon note and mortgage till default in the payment of Hiatt's bond. He had to await this contingency; and this contingency had not occurred. The war commenced before Hiatt's bond became due. Hiatt could not then make default, because payment was prohibited. When the effort was made to confiscate Kenyon's note to Hiatt, Brown had no right to collect it. He could not take the proceeds of it. It was not his. He had in 1863, no right or title in or to it, which could be confiscated. He held a naked trust. The substance belonged to Hiatt, and was controlled by him. In Hiatt's letter of the 4th of May, 1861—p. 19—and Brown's reply of the 29th of May, 1861, and the enclosed paper, (Exhibits G. and H., pp. 19, 20,) the last transaction between them, the war having then commenced, they arranged, that Kenyon should pay Hiatt 20 per cent., the same rate of interest that Hiatt's bond to Brown was bearing. Kenyon's note and mortgage to Hiatt was not Brown's *property, money, stocks, credits, nor effects.* Brown had no right in Kenyon's note and mortgage which could be confiscated. So far as there was property therein capable of being confiscated, that property was Hiatt's.

Again: in the confiscation case which involved Brown's rights in Hiatt's bond for $2,400 00, and Hiatt's mortgage to secure the payment thereof—the primary security—the Court had dismissed all proceedings as to this bond and mortgage *without prejudice.* See abstract of decree, pp. 48, 49. Having then freed Brown's rights as creditor of Hiatt from liability to confiscation, and from all prejudice in consequence of confiscation proceedings against them, how could the mere trust he held in a secondary or collateral security for the payment of said bond be confiscated?

Again: the issue on the plea of payment, on which the defendants relied, the Court below found, rightly, for the plaintiff—see decree, p. 68. The issue was, that they had paid the bond of $2,400 00 in 1862, with the Perkins judgment and Kenyon note—see their answer, p. 22, transcript, p. 67. Having found this issue for the plaintiff, how could the defendants be entitled to a credit for the amount of Kenyon's note? If no payment, then no credit. This result in the decree is in conflict, not only with the law and the facts, but also with the finding of the Court.

Again: the defence set up in the court below, that the Kenyon debt was confiscated—p. 23—is met by a denial in the replication—p. 25. When we look to the proofs we see it never was confiscated. Kenyon's note and his mortgage were in the hands of Edward S. Brown in Virginia—see deposition p. 27. *This fact is stated in defendants' answer*—p. 21. That the Marshal had attached and detained Kenyon's note and mortgage in his custody in Kansas was a *false return.* Hiatt knew it to be *false*—knew that Brown had *the note and mortgage in Virginia;* so stated in his answer; and it is proved in the testimony—see 8th question and answer, p. 27. He had been cited by the Marshal. He had agreed with Brown to do whatever was necessary to preserve the collaterals from loss, that if the bond for $2,400 00 was not otherwise paid, resort might be had to them—see question and answer, No. 13, pp. 27, 28. Hiatt made no defence in the proceedings which sought the confiscation of Kenyon's note. Brown knew nothing of them, and could not defend them. In these proceedings there was no appearance, and no default entered except as to Kenyon and wife, no evidence, no jury, no finding of any thing except that Kenyon owed the note secured by the mortgage, no finding to whom he owed it; and there was no forfeiture or condemnation adjudged or decreed—p. 51. These proceedings are a nullity. There was no seizure of the Kenyon note and mortgage, and the court acquired no jurisdiction over them. So it was held

in *Pelham* vs. *Rose*, 9 Wall. 103; and decided, as we are informed, at the present term of the court, in *Pelham* vs. *Way*.

The pretended confiscation being of that, which it now appears could not legally have been confiscated, and Hiatt, who knew the real facts, having failed to bring them forward, and not only did nothing to prevent the alleged judgment, but did all that he could to procure it—he, and not Brown, must bear the loss, if any, resulting therefrom; *Westoby* vs. *Day*, 2 El. & Bl., 623, 75 Eng. C. L. Brown certainly is not estopped from shewing the nullity of the proceedings, *Matthey* vs. *Wiseman*, 18 Com. B., N. S. 679, 114 Eng. C. L.

Again: credit on debt recovered by plaintiff against defendant can only be sustained on one of two grounds: First, payment: Second, set-off.

That this credit was not given on the ground, that payment had been made, we think we have clearly demonstrated, not only by the finding of the court in its decree; but by the argument already made on the proofs in this cause. Let us enquire whether this credit can be sustained as a set-off? Set-off must be a money demand and of a liquidated nature. A claim for unliquidated damages is not a subject of set-off. If Brown had been guilty of a breach of trust under the assignment of Kenyon's note as collateral security, (of which there is no pretense) the damages resulting therefrom, would not be a subject of set-off in a suit on Hiatt's bond, *Crawford* vs. *Stirling*, 4 Esp., 207; *Morley* vs. *Inglis*, 4 Bing., 58, 33 Eng. C. L.; *Gillett* vs. *Mawman*, 1 Taunt., 137; *Hardcastle* vs. *Netherwood*, 5 Barn. & Ald., 97, 7 Eng. C. L.

In any aspect in which we view the relations between Hiatt and Brown, in reference to the Kenyon debt, it seems to us clear, that Hiatt is not entitled to credit that debt on his bond to Brown.

2. It was error to count $3,037 50 as the amount due Edward S. Brown, the appellant in the cross-appeal.

The account of the debt to the 28th November, 1870, when the decree was rendered, will stand thus:

Amount of the bond 29th May, 1861, when it became due, -	$2,400 00
Interest thereon at 20 per cent. to 28th November, 1870, 9 years, 5 months, 29 days, - - - - - - - - - - -	4,558 57
Whole amount due 28th November, 1870, -	$6,958 57

If the credit of $955 be given as of the 19th November, 1863, the account will stand thus:

Amount of the bond 29th May, 1861, when it became due, -		$2,400 00
Interest thereon at 20 per cent. to 19th November, 1863, 2 years, 5 months, 20 days, - - - - - - -	$1,186 60	
Credit by, - - - - - - - - -	955 00	
Excess of interest over credit, -		231 60
Interest at 20 per cent. on $2,400 from 19th November, 1863, to 28th November, 1870, 7 years, 9 days, - - - - -		3,371 97
Due 28th November, 1870, - - - -		$6,003 57

For the cause of the discrepancy between either of the amounts due the 28th November, 1870, according to the computations above, and the amount specified in the decree, we search the record in vain; and the counsel for the appellant in the cross-appeal insist, that the court cannot go outside the record to find reasons to justify the decree.

It is anticipated, however, that the counsel for the appellees will seek to explain this discrepancy by referring to a report of this case which appeared first in the Chicago Legal News of the 11th of March, 1871, and more recently in 1 Dillion's Cir. Ct. R. 372. From this report it will be seen that the court below was of opinion, that interest should not be computed between the 19th of April, 1861, and the 26th May, 1865; those periods being regarded by the court as the commencement and termination of the war.

The abatement of interest during the war was not in issue. The defendants did not make such a defence. They did not ask an abatement of interest. Their defences were alone, limitations, payment, confiscation of the Kenyon debt. The court cannot of its mere motion raise issues between the parties, and then decide them.

Interest stipulated in the bond is part of the debt, and the Court cannot abate it.

Cases in which interest may be recovered are divided into two classes:

1. Contracts for the payment of money in which there is no agreement in regard to interest.

2. Contracts in which the parties stipulate for the payment of interest.

The principles which govern the court in cases falling within one of these classes are very different from those which govern it in cases under the other. Let us discuss these principles:

1. Contracts for the payment of money in which there is no agreement in regard to interest.

When contracts of this class are broken: when the debtor detains the money from the creditor after the day on which he contracted to pay it, the court looks to the damage which the creditor has sustained by the breach.

The *quantum* of damage is matter of inquiry, and depends on the circumstances which surround the case. Interest is compensation for the use or detention of money.

The statute law usually fixes a maximum rate, beyond which parties cannot contract. Within this limit, custom fixes in each community the rate of compensation for the use or detention of money, and this rate, or that which the law prescribes, where there is no agreement between the parties, is usually resorted to as a standard by which the damage sustained by the creditor is measured. When money is detained beyond the day it was payable, and no agreement has been made in regard to interest, the law implies a contract to pay what the use of the money is worth: a *quantum meruit*. When in such cases interest is given by the court or jury, it is the measure of damage for the breach of this implied contract.

In the early practice in the common law courts, a contract to pay interest was not implied. If a bond or note specified a certain sum to be paid on a given day, saying nothing about interest and default in payment was made by the debtor, interest could not be recovered; but at a later period a contract to pay interest was implied, and interest recovered as damages.

Some of the older cases exhibit the remarkable practice of *debt* for the principal, and *assumpsit* for the interest on the same cause of action.

Seeman vs. *Dee*, I Ventris 198. *Herries* vs. *Jamison*, 5 Term R. 555.

In *Exparte Marlar and others*, I Adkins 150, Lord Ch. Hardwicke said, p. 151, "Even at law where notes are for value received, and interest is not expressed, the jury do not give the plaintiff in an action upon the notes, interest for them, but by way of damages only."

In *Du Belloix* vs. *Lord Waterpark*, 1 Dowling & Ryland, p. 16; 16 Eng. Com. Law. R., p. 12, (assumpsit on promissory note payable six months after date, with no interest expressed) Abbott, C. J., said: "Whether the plaintiff was entitled to interest on his principal debt, was peculiarly in the province of the jury to decide. Interest upon such securities is no part of the debt, and where it is given, it is upon the ground of the injury which the party has sustained by the detention of his debt, after it may be lawfully demanded. * * * But there is another objection to the plaintiff's recovering interest on the debt, for during the greatest part of that time he was an alien enemy, and could not have received even the principal in this country, and at all events during that portion of the time the interest could not have run, and it would have been illegal to pay the bill whilst the plaintiff was an alien enemy."

Bailey, J., said: "The question of interest was entirely for the decision of the jury. * * * Interest upon a bill of

exchange or promissory note is no part of the debt; it has been decided in the case of bankruptcy, that interest on such securities cannot be added to the principal to make good the petitioning creditor's debt. It has been clearly decided that the interest is the damage for the detention of the debt."

In this class of cases interest is given by operation of law; and it is within the province of the court and jury to give, or refuse it. During war, it is illegal for the debtor, a citizen of one of the belligerant powers, to pay his creditor, a citizen of the other. The law will not imply a contract to do what it is illegal to do; and the law will not subject the citizen to damages for failing to do what the law prohibits? hence, during war, in this class of cases, the courts abate interest between the citizens of the hostile powers.

2. Contracts in which the parties stipulate for the payment of interest.

Interest stands on a very different footing, when it is expressed on the face of the bond or note; it is then a part of the covenant or contract; it is then as much debt as the principal. By the act of the parties it is placed beyond the reach of the court and jury. In this class of cases, to give the principal and abate the interest, would change the covenant or contract of the parties. It would abstract some of its terms or insert others; it would impair the obligation of the contract, which no State law can authorize, and if enacted, no court can enforce.

In *Cameron* vs. *Smith*, 2 Barn. & Ald. 305, Abbott, C. J. said: "The distinction between cases where interest is reserved on the face of the bill itself, and those where it is not, had not at first occurred to my mind. I find, however, that the distinction has been recognized by Lord Hardwicke, * * * that when interest is not expressed in the body of the note, the jury on the trial do not give the plaintiff interest, but by way of damages only."

Bailey, J. said: "I am quite satisfied that the distinction is between those cases where there is an express understanding by the party to pay both principal and interest, and those where he undertakes to pay the principal only. In the latter case the interest is no part of the debt, but only in the nature of damages. * * * If the interest constitute a part of the debt the Chancellor cannot refuse to allow the holder to prove for it; for he cannot distinguish between one part of the debt and another."

Holroyd, J., said: "When the interest is expressly agreed to be paid, it may be considered as a part of one aggregate debt; but when a specified sum only is agreed to be paid, the interest is recoverable as damages."

Best, J., said: "I am satisfied with the propriety of the distinction between the cases where there is an express stipulation for interest and those where there is not."

In *Keene* vs. *Keene*, 91 Eng. Com. Law R., 144, Com. B., (action on Bill of Exchange for £200, dated 21st February, 1853, "payable twelve months after date, with interest at the rate of ten per cent. per annum"): Held, that interest up to the time of the maturity of the note was a part of the debt. After the maturity it was given as damages.

In *Brewster* vs. *Wakefield*, 22 Howard, 118, (promissory note payable twelve months after date, with interest thereon at the rate of 20 per cent. per annum from the date thereof,) held—p. 127—"There is no stipulation in relation to interest, after the notes became due in case the debtor should fail to pay them; and if the right to interest depended altogether on the contract, and was not given by law in a case of this kind, the appellee would be entitled to no interest whatever after the day of payment. The contract being entirely silent as to interest if the note should not be punctually paid, the creditor is entitled to interest after that time by operation of law, and not by any provision in the contract."

In Kentucky in 1869, in an action on a note executed in Missouri for $500, payable one day after date, "with ten per cent. interest from date," interest was computed to the date of the judgment; the court distinguishing, *Brewster* vs. *Wakefield*, 22 How., 118, from such a case. Harden, J., says: "the amount of interest secured by the contract in excess of the rate of six per cent. per annum, for a single day, is so inconsiderable, that it is scarcely reasonable to suppose the parties intended to restrict the stipulated rate of interest to the maturity of the contract; but we must conclude that they intended it to continue until the debt should be paid." *Gray, &c.* vs. *Briscoe*, 6 Bush., 691.

The distinction between the classes of cases is manifest on reason and authority. Where the parties have, in the bond or note, fixed the obligation for the payment of interest it is as much the debt as the principal, and the court has no more power to relieve the debtor from one than the other.

When the creditor and debtor reside on different sides of the belligerant lines, war suspends the payment of the debt; but when the war ends, the rights of creditor and the obligation of the debtor revive as to the whole contract, to pay interest when interest is stipulated, as much as to pay the principal.

Some confusion may be found in some of the authorities; but where it exists it no doubt results from failing to observe the distinctions here indicated.

The bond in the case before the court is to pay twelve months after date, with interest from maturity at 20 per cent. per annum. Not from date to maturity, as in the case of *Brewster* vs. *Wakefield;* but *from the maturity of the bond* until paid. The bond matured the 29th May 1861, and from that time forward the interest was as much the debt as the principal, and the right to demand the interest revived on the termination of the war as well as the right to demand the principal. The court had no power to impair the contract

by striking out and changing the terms, so as to except the time from the 19th April, 1861 to the 26th May, 1865.

A debtor who is ready to pay, and wishes to pay, but is prevented from paying by being cut off from intercourse with his creditor by the running of belligerant lines between them, occupies a very different position from that of Hiatt—especially, if such debtor is not placed beyond relief by binding himself in his bond to pay interest. A court of equity will favor such a debtor.

Hiatt takes the position that he has not been indebted to Brown since May, 1861, in any sense whatever—p. 46, transcript 142. On this defense, issue is joined; and it is found against Hiatt. He has no claim to the equitable relief from accruing interest of a debtor, who is ready and willing to pay; but prevented from paying.

Suppose Hiatt had in 1860 leased from Brown a tract of land in Leavenworth county, Kansas, for ten years, and bound himself in his bond to pay an annual rent. Can it be questioned, that on the termination of the war, Brown's right to the rent which accrued during the war, would have revived and could be enforced? Hiatt was in possession, use and enjoyment during the war of Brown's money, and of the land conveyed to secure its payment. On what principle of equity should he be relieved from making compensation for the use and enjoyment? This compensation he has fixed and bound himself by his bond to pay, and the court below could not, if it would, discharge him from it.

This position is fortified by the statutes of Kansas and the decisions of the courts of that State.

In the laws of Kansas 1855; sec. 2, p. 367, is this enactment: "The parties may agree in writing, for the payment of any rate of interest on money due, or to become due upon any contract."

The Act of 16th of February, 1860, (Compiled Laws of

1863, pp. 603, 4,) provides, that "the parties to any bond, bill, promissory note, or other instrument of writing, for the payment or forbearance of money, may stipulate therein for interest receivable upon the amount of such bond, bill, note, or other interest, at any rate not exceeding twenty per cent. per annum."

The Act of 29th of February 1868 (General Statutes of Kansas, p. 526) provides, sec. 5, that "all judgments of courts of record and justices of the peace shall bear interest from the day on which they are rendered, at the rate of seven per cent. per annum, except as herein otherwise provided;" and, sec. 6, that "when a rate of interest is specified in any contract, that rate shall continue until full payment is made; and any judgment rendered on any such contract, shall bear the same rate of interest mentioned in the contract, which rate shall be specified in the judgment; but in no case shall such rate exceed twelve per cent. per annum."

Dudley vs. *Reynolds*, 1 Kansas 285, was an action on a promise to pay a certain sum, seven months after date "with interest at the rate of 5 per cent." until paid. Court gave interest at that rate till judgment was rendered. This was recognized and acted on in *Small* vs. *Douthett*, Id. 338, and *Young* vs. *Thompson*, Id. 114; and so, in the late case of *Lacy* vs. *Dunn*, 5 Kansas, 570.

On these laws and these decisions, the court below should have computed interest on $2,400 00 from the 29th of May, 1861, (the maturity of the bond) to the 28th of November, 1870, (the time when the decree was rendered) at 20 per cent. per annum, "the rate specified" in the bond, and should have added this to the principal; and then decreed, that the defendants pay the plaintiff the aggregate sum, with interest thereon at 12 per cent. per annum from the date of the decree, until paid; and in default thereof, that the mortgage be foreclosed.

CONWAY ROBINSON,
EDWARD S. BROWN,

Counsel for Appellee in the Appeal,
and for Appellant in the Cross-Appeal.

6. Question. Did you ever make any collection, or receive anything on said note? If so, what?

Ans. I never collected or received any money or anything else on said note.

7. Question. Did ever hold or control said note as your own property?

Ans. I never did; I only held it as collateral security to that of Mr. Hiatt's mortgage, to secure the payment of the bond for $2,400 00.

8. Question. What become of said note?

81 Ans. On my return from Kansas, a few days thereafter, I brought said note and Kenyon's mortgage with me to my home in Virginia, and kept them with the bond and mortgage taken from B. W. Hiatt and Martha Ann Hiatt, and with other bonds and mortgages taken from persons in Kansas to whom I had made loans for higher rates of interest than was allowed in Virginia. I retained these papers in my possession at my home in Virginia until Sept., 1865. I then went again to Kansas, and carried these papers with me. After remaining there about a month, when I was returning to my home in Virginia, I placed these papers, together with Kenyon's note and Kenyon's mortgage, just as I received them from Mr. Hiatt, in the hands of H. T. Green, esq., my attorney, in Leavenworth City, where he resides. I have not seen the note since. In Sept., 1868, I was in Kansas again, and was surprised at not finding this note with the papers. I desired to file it with the papers, or rather with the bill in this suit. Mr. Green and myself searched in his office for it, but could not find it.

82 9. Question. Did you make any collection or receive anything on the judgment against G. W. Perkins; if so, what?

Ans. I never did.

10. Q. Did you or did you not authorize B. W. Hiatt or any other person, to purchase for you the lot in Leavenworth, said to have been mortgaged by G. W. Perkins, to secure the debt to Hiatt, on which said judgment had been rendered?

Ans. I never authorized any one to purchase for me said lot. I never desired to own real estate in Kansas; my object was to make the interest on my money. I had never seen said lot. I was informed in 1861, first by a letter from Mr. Sawyer, and afterwards by a letter from Mr. Hiatt, that the lot had been offered for sale and bid in by Mr. Hiatt's direction, in my name. I wrote to them if the sale should be confirmed the conveyance should show that it was to be held as collateral security for the payment of Mr. Hiatt's bond for $2,400 00. I never agreed and never desired to hold any other relation to that property.

11. Question. Did you or did you not ever receive any rents or profits from said lot?

83 Ans. I never did, and never authorized any one else to receive any for me.

12. Question. Did you or did you not ever treat said lot as your own property?

Ans. I never did.

13. Question. Was there or was there not any agreement between you and B. W. Hiatt in regard to his giving any attention to these collaterial securities, in your absence; if so, what was it?

Ans. The agreement was such as I have stated to have been made at the time of the execution of the bond. I never had with Mr. Hiatt any other agreement, and this looked to his doing only what might become necessary to preserve these collaterals from loss, and this I under-

stood and Mr. Hiatt so expressed himself to be for our mutual benefit; for me, if it should become necessary to resort to them for the payment of the bond, and for Mr. Hiatt, if the bond, when it became due, should be otherwise discharged.

14. Question. Was there or was there not, at any time, any agreement between you and B. W. Hiatt, or either of the defendants, that B. W. Hiatt should, at his election, determine that you should
84 take Kenyon's note and the judgment against G. W. Perkins, or the lot said to have been mortgaged by G. W. Perkins to secure the debt for which said judgment was rendered, in full or in part satisfaction of the bond for $2,400 00.

Ans. There was never an agreement between myself and Mr. Hiatt or any other person, that Mr. Hiatt might make his election for me to take Kenyon's note and Perkins' lot in satisfaction in full or in part, of the bond for $2,400 00, nor any agreement of similar import, nor any thing of that kind ever proposed to me.

15. Question. Did you or did you not, at any time, receive a letter from B. W. Hiatt, or any other person informing you that B. W. Hiatt had made his election that you should take Kenyon's note and said judgment against G. W. Perkins or said lot in satisfaction in whole or in part of said bond, for $2,400, or any letter proposing that you should take Kenyon's note and said judgment or lot in satisfaction of said bond for $2,400, in full or in part?

85 Ans. I never received a letter from B. W. Hiatt, nor any other person, which informed me that he had made his election for me to take Kenyon's note and the judgment against Perkins, or said lot, in satisfaction, in whole or in part, of said bond for $2,400, nor any letter proposing that I should take them.

16. Question. Did you or did you not, at any time, write a letter to B. W. Hiatt, or any one else, expressing your willingness to take Kenyon's note and the judgment against Perkins, or said lot, in satisfaction of the bond for $2,400, in whole or in part?

Ans. I never wrote a letter to B. W. Hiatt, nor any one else, expressing my willingness to take Kenyon's note and the judgment against Perkins in satisfaction of the bond for $2,400, in whole or in part, nor any letter which expressed anything of similar import.

17. Did you ever have any conversation with B. W. Hiatt or Martha Ann Hiatt, or ever see either of them after the time of the execution of said bond for $2,400; if so, when, where, and what was said?

86 Ans. I never conversed with nor saw B. W. Hiatt nor Martha Ann Hiatt after the 29 May, 1860, the time of the execution of the bond & mortgage and assignment of said collaterals.

18. Question. Did you ever have any written correspondence with the defendants, or either or them; if so, when and what was it?

Ans. After getting a letter from Mr. Sawyer, who was attorney for Mr. Hiatt, informing me that the lot said to have been mortgaged by Mr. Perkins, had been offered for sale and bid in by Mr. Hiatt' directions in my name, I wrote to Mr. Hiatt. I generally preserve copies of my letters. I have looked among my papers for a copy of that letter, but have not found it. I do not know that I preserved a copy of it, but I desire Mr. Hiatt to produce the original and file it with the papers in this cause. After waiting some time without getting a reply, I wrote to him again on the 15th April, 1861, and mailed it to his proper p. office. A copy of that letter is filed with the bill in this case, marked "E;" a copy is also attached to this deposition, also marked "E."

87 After writing that letter I received from Mr. Hiatt a letter dated the 11th April, 1861, which I filed with the bill in this case, marked "D," a copy of which is attached to this deposition, also marked "D." I afterwards received from Mr. Hiatt a letter dated the 4 May, 1861, acknowledging the receipt of my letter of the 15th April, 1861; that letter is filed with the bill in this case, marked "F," a copy is hereto attached, also marked "F." Mr. Hiatt's letter of the 4 May, 1861, was somewhat delayed in its passage. I replied to it on the 29th May, 1861, mailing my reply to Mr. Hiatt's proper p. office, as other letters previously written to him; a copy of that reply, and of the paper therein referred to, which was enclosed and mailed, and the reply, are filed with the bill, marked "G" and "H," and copies are hereto attached, also marked "G" and "H." My reply of the 29 May, 1861, (eighteen hundred and sixty-one,) closed my correspondence with Mr. Hiatt.

88 I never received a letter from him afterwards, and never wrote to him afterwards. I never received a letter from Mrs. Hiatt, and never wrote her one. The letters herein mentioned are all that ever passed between B. W. Hiatt and myself, as far as I have any recollection or any knowledge.

19. Question. What is the date of the last letter which you received from B. W. Hiatt, and the date of the last letter you wrote to him?

Ans. The last letter I received from B. W. Hiatt is dated the 4th May, 1861, and the last letter I wrote to him is dated the 29th May, 1861. After the 29th May, 1861, my intercourse with him ceased entirely.

20. Question. Did you ever offer to reassign or redeliver to him Perkins' judgment or Kenyon's note and mortgage; if not, why?

Ans. I never offered to reassign or redeliver the judgment against G. W. Perkins or Kenyon's note and mortgage. After the 29th May, 1861, in consequence of the war, there was an entire cessation of intercourse between myself and the people of Kansas. I supposed

89 that my matters in Kansas would remain during the war, as they were when the war came on. I did not know of any legal proceedings in regard to them between May, 1861, and the close of the war. In Sept. 1865, I went to Kansas; I examined the records of the courts; I learned from other sources what I could about my matters. I learned that Cockerill's claim on the mortgage which G. W. Perkins had given on said lot to him had been decided to be entitled to priority over the mortgage given to Hiatt; that the lot had been sold to satisfy Cockerill's mortgage, and was not sufficient for that purpose; that the judgment against Perkins assigned to me by Mr. Hiatt, was, by the proceedings in Cockerill's suit, which was instituted and concluded during the war, and of which I had no previous knowledge, had thus been ascertained to be worthless. I saw Mr. Hiatt's answer in the confiscation suit 140 & 141, which included, among other debts, the

90 bond for $2,400. I saw the dismissal of said suit as to the bond of $2,400, and that the officers of the court were led to institute the confiscation suit No. 152, against Kenyon's note and mortgage, which were decreed to be forfeited to the Government of the United States. Of these facts the records showed that Mr. Hiatt was well apprised, and as to Kenyon's note, had contributed to its confiscation. To have offered to reassign the judgment against Perkins, would have been to offer that which Mr. Hiatt and myself knew to be worthless; to have offered to reassign Kenyon's note and mortgage, would have been to offer that which he had rendered worthless to me and to himself; but if they had been of any value, I considered myself en-

titled to hold them as security collateral to the morgage of himself and Mr. Hiatt, for the payment of the bond of $2,400.

21. Question. Did B. W. Hiatt ever request you to reassign or redeliver Kenyon's note and mortgage, or take any steps to guard against the loss thereof. If so, state what it was, and how far you complied therewith?

91

Ans. He never made any such request.

22. Question. Where did you reside at the time of the execution of the bond and mortgage and assignment of the collaterals, and say whether B. W. Hiatt was informed of your place of residence?

Ans. I resided in Cumberland County, Virginia, and so informed Mr. Hiatt.

23. Question. Where did you reside at the commencement of the late war between the United States and the so-called Confederate States?

Ans. I resided in the same place—Cumberland County, Virginia.

24. Where did you reside during the continuance of said war, and what was your position in reference to the dividing lines held by the hostile forces in said war?

Ans. I continued to reside uninterruptedly in Cumberland County, Virginia, until Nov., 1863; I then removed to Powhattan County, Virginia, an adjoining county to *to* Cumberland, 8 miles from my former residence, and I there resided continuously until after the close of the war. I was, during the whole time of the war a resident of, and continued within, that portion of Virginia which was held by the military forces of the confederate government—a resident of that portion which, by the President's proclamation, was declared to be in insurrection. I was a private citizen and staid at home almost constantly the whole time of the war. I was at no time during the war in any of the States which remained loyal to the United States Government, or in any portion of the country which was embraced within the lines held by the forces of the United States.

92

25. Question. Did you have any letter of safe conduct or license or permission to go to or remain in that portion of the country which remained loyal to the Government of the United States, or to have any intercourse with the citizens thereof?

Ans. I did not have any letters of safe conduct or any license or permission to go to, nor remain in that portion of the country which remained loyal to the Government of the United States or to have any intercourse with the inhabitants or citizens thereof, and I did not go to, nor remain in such portion of the country, and I had no intercourse with the citizens or inhabitants thereof from the 29 May, 1861, until the close of the war.

93

26. Question. Did you have any correspondence with any of the citizens of Kansas during the war? If your correspondence with them ceased, say when?

Ans. I am confident that my reply to Mr. Hiatt of the 29 May, 1861, was the last letter I wrote any one in Kansas, or to any one in any of the loyal States until after the close of the war, and I am confident that I received no letter from any one in Kansas, nor from any one in any other of the loyal States between the 29 May, 1861, and the close of the war, and I had no information or knowledge of any proceedings in court or out of court, which took place between May 1861, and the close of the war affecting any of my interests in Kansas until I was informed of them after the close of the war. I knew that acts of Congress had been passed authorizing the confiscation of property for certain violations of the laws, but I did not know until after the war, that

94

any one had charged me with these violations, or thought me guilty of these violations, or had instituted legal proceedings looking to the confiscation of any of my property. I did not know until after the close of the war anything about Cockerill's suit nor anything done after May 1861, in regard to Perkins' lot by Mr. Hiatt or Mr. Sawyer, his attorney.

27. Question. Do you know, or can you set forth any other matter or thing which may be of benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this, your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

Ans. I do not know of anything else that is material to either
95 side, or if I had at any time had knowledge of anything else material I cannot now recall it.

And further the deponent saith not.

EDWARD S. BROWN.

STATE OF VIRGINIA, *City of Lynchburg, to wit:*

I, R. S. Lacy, United States commissioner for the district of Virginia, do hereby certify that the foregoing deposition of Edward S. Brown was duly taken on oath, and subscribed before me at the place mentioned, and to be read in the cause mentioned in the caption hereto, commencing the 10th day of May, 1869, but not being completed on that day, it was adjourned from day to day until completed, in accordance with the commission, and notice hereto attached. Copies of the papers referred to by the deponent in his answers, and which copies were before him on his examination, are hereto attached, marked "D," "E," "F," "G," and "H."

96 In testimony whereof I have hereunto set my hand this 13th day of May, 1869.

R. S. LACY,
U. S. Commissioner.

SUNNYSIDE P. O., CUMB. CO., VA., 15*th April*, 1861.

B. W. HIATT, Esq.

DEAR SIR: I wrote to you some 2 months since in regard to the deed from Mr. Phelps, which Judge Hemingray had deposit*ions* with the recorder, but which had not been recorded on ac't of the fees not being paid. I also called your attention to the sale for delinquent taxes on the half section where you reside; since then I have heard nothing from you. Do me the favor to let me know whether these matters have been attended to. Let me know also, how stands the judgment against G. W. Perkins. If the sale of the property is confirmed, and if it be bought in, the deed of conveyance, if it can
97 be so arranged had better show on its face an understanding that this is collateral security, together with the mortgage which you and Mrs. Hiatt gave on the bond of yourself and Mrs. Hiatt to me, which is to be released when the bond and interest is paid. Let me hear from you as soon as convenient.

Yours very respectfully,

EDWARD S. BROWN.

Copy of Exhibit "E" referred to in the answer to the 18th question in Edward S. Brown's deposition, and is thereto attached, marked "E."

R. S. LACY,
U. S. Commissioner.

LEAVENWORTH Co., K. T., *4mo. 11th*, 1861.

ESTEEMED FRIEND BROWN: I have just arrived home from the East. Having an entire failure of crops on my farms in Kansas, I consequently went to the State of Pennsylvania, took a contract of some parties on the Allegheny River by which I have been enabled to send means home to my wife and children to subsist upon, also to feed my stock
98 upon. I would have answered immediately, but was not at home until now. My property is not sold for taxes. D. Smith, my neighbor, told me a few days before leaving, that he paid my taxes on my ½ section alluded to in thy letter, and I should have paid it, but really had no money to pay it with; so it lays just so. But I now have the money to pay it, and will attend to it, and will have the deed recorded alluded to. Please write immediately and say who I shall arrange the Kenyon mortgage with. I also have had the mortgage closed in Leavenworth on the Perkins house and lot, and bought it in, and how shall that be arranged. The poor people of Kansas have a hard winter. The suffering has been very great. None have raised anything except a few in Leavenworth and adjoining counties. The great difficulty is for us to get seed of all kinds which none of us have. The price of land in Kansas is about the same for the last twelve months. I could sell my half section for 20 dollars per acre, but would rather
99 keep it than take that. I now have a good prospect of paying off thy mortgage on it when it becomes due. I have some enemies here who have circulated the news that I had run off this winter to never return; but I was only away to maintain my family because I could neither collect anything owing to me, or had anything to grow on my farm. I shall probably work on a contract in Pennsylvania this summer, and the proceeds I intend to pay thee on that mortgage.

We have nice rains here now, and fine prospects for crops.

Respectfully, thy friend,

B. W. HIATT.

Copy of Exhibit "D" referred to in the answer to the 18th question in Edward S. Brown's deposition, and is thereto attached, marked "D."

R. S. LACY,
U. S. Commissioner.

LEAVENWORTH Co., KANSAS,
Spring Dale P. Office, 5 mo. 4th, 1861.

FRIEND BROWN: Thine of the 15th of last month is before me. I have not got the deed recorded alluded to. Have been to the
100 office twice since my return home, but failing to see the recorder each time is the reason of my not having it attended to. The sale of the Perkins property is not confirmed yet. I have been so much pressed for means, on account of the entire failure in crops in Kansas last year, that I really had to use what little money I had on hands to buy clothing and something to eat for my family, and could not as yet pay the costs of sale, &c. It is not, however, returned yet, & I will pay the costs, if possible, which is about 70 dollars. The rent of the property is 225 dollars per annum. I have paid the taxes on my residence. John H. Kenyon is ready to renew his mortgage and note for 20 per cent., which I want done, as it will save me paying 10 per cent. out of my own pocket, which will be quite an item in these hard times. Send the papers to some att'y here and have them arranged, as that was our agreement; & then, friend Brown, his note has be'n due ever since

Christmas, and only drawing 10 p'r cent., and me paying thee 20.
101 Respectfully,

B. W. HIATT.

Copy of Exhibit "F," referred to in the answer to the 18th question in Edward S. Brown's deposition, and is thereto attached, marked "F."

R. S. LACY,
U. S. Commissioner.

SUNNYSIDE P. O., CUMB. CO., VA., 29 *May*, 1861.

B. W. HIATT, Esq.

DEAR SIR: Yours of the 4th inst. is at hand. Enclosed you will find such obligation for the payment of the additional interest to you as I think Mr. Kenyon ought to give. He, of course, expects to pay you such interest on the sum which he owes as, together with that due on his note, will make 20 per cent. from the time his note became due. If you are satisfied with his responsibility there need not be any additional mortgage. If you are not I will prepare a suitable mortgage and send it to you. I now write in haste.

102 With assurances of my respect and esteem, I am yours very respectfully,

EDWARD S. BROWN.

Copy of Exhibit "G," referred to in the answer to the 18th question in Edward S. Brown's deposition, and is hereto attached, marked "G."

R. S. LACY,
U. S. Commissioner.

Know all men by these presents that, whereas I am indebted in the sum of eight hundred dollars by note dated the 11 December, 1858, payable on the 25th December, 1860, to Benajah W. Hiatt, with interest at 6 per c't. from date, with a credit of seventy-five dollars, 7th February, 1860, endorsed thereon, which note is secured by mortgage executed by myself and wife the 13th May, 1859, and recorded in the office of the register of deeds, county of Leavenworth, Kansas, book L, pages 119 & 120, which note and mortgage were assigned on the margin of the record the 29 May, 1860, to Edward S. Brown as collateral security for the payment of a bond of $2,400, secured by mortgage from said Hiatt & wife, recorded in the register's office, county of Leavenworth,
103 Kansas, book L, p. 476, which bond bears 20 p'r c't. interest from maturity: Now, in consideration that further indulgence has been given to me in the payment of the note of $800, I do hereby bind myself to pay to Benajah W. Hiatt such additional interest on the principal sum due on said note as, together with the 6 p'r c't. payable on its face, will make 20 p'r c't. interest on said principal sum from the 25 December, 1860, until paid.

Witness my hand and seal this 29 day of May, 1861.

[SEAL.]

Copy of Exhibit "H," referred to in the answer to the 18th question in Edward S. Brown's deposition, and is thereto attached, marked "H."

R. S. LACY,
U. S. Commissioner.

Commission.

UNITED STATES OF AMERICA,
District of Kansas, ss:

In the circuit court of the United States for the district of Kansas.

EDWARD S. BROWN, COMPLAINANT,
vs.
BENAJAH W. HIATT AND MARTHA ANN HIATT, defendants.

To R. S. Lacy, greeting:

Know ye that we, in confidence of your prudence and fidelity, have appointed you, and by these presents do give unto you full power and authority diligently to examine all witnesses whatsoever upon certain interrogatories to be exhibited to you in a cause wherein Edward S. Brown is complainant, and Benajah W. Hiatt and Martha Ann Hiatt are defendants; and therefore we command that you do, at certain days and place to be appointed for that purpose, cause the said witnesses to come before you, and then and there examine each of them apart upon the said interrogatories upon their solumn oaths or affirmations, and that you do take such their examination and reduce them into writing, and when you shall have so taken you are to send the same to us in our circuit court for the district of Kansas, held in Topeka, in the State of
Kansas, without delay wheresoever; it shall then be closed up,
105 and, under your seal, distinctly and plainly set together, with the said interrogatories and this writ. And we further command you that before you act in, or be present at, the swearing or examining any witness or witnesses, you do take the oath first specified in the schedule hereto annexed.

Witness my hand and the seal of said court, at my office, in the city of Topeka, this 30th day of April, A. D. 1869.

[SEAL.] A. S. THOMAS, *Clerk.*

UNITED STATES OF AMERICA,
District of Kansas:

In the circuit court of the United States for the district of Kansas.

EDWARD S. BROWN, PLAINTIFF,
vs.
BENAJAH W. HIATT AND MARTHA ANN HIATT, defendants.

The said Benajah W. Hiatt and Martha Ann Hiatt, and their
106 attorneys of record, will take notice that, on Monday, the tenth day of May, A. D. 1869, the complainant above named will take the depositions of sundry witnesses, to be used as evidence on the trial of the above cause, at the office of Edward S. Brown, in the town of Lynchburg, in the county of Bedford, State of Virginia, between the hours of eight o'clock a. m. and six o'clock p. m. of said day, and that the taking of the same will be adjourned from day to day at the same place, and between the same hours, until they are completed.

Legal service of the above is hereby acknowledged to have been made on us this 27th day of April, 1869, and it is agreed that depositions may

be taken without commission or interrogatories, and read without regard to issue joined.

GREEN & FOSTER,
Att'ys for Complainant.

H. GRISWOLD,
Att'y for Defendants.

(Endorsed:) Edward S. Brown vs. Benajah W. Hiatt, Martha Ann Hiatt. No. . Deposition of Edward S. Brown, taken before me. R. S. Lacy, U. S. commissioner. Opened at the instance of H. T. Green, May 23d, 1870, att'y for Brown. A. S. Thomas, clerk. Filed
107 May 19, 1869. A. S. Thomas, clerk.

And on this day, to wit, the 22nd day of May, A. D. 1869, came the said defendants, by their solicitor, and filed in the said clerk's office the deposition of Robert Crozier, which deposition, with the endorsement thereon, is in the words and figures following, to wit:

In the circuit court of the United States in and for the district of Kansas.

STATE OF KANSAS, *Leavenworth County:*

EDWARD S. BROWN, COMPLAINANT,
vs.
BENAJAH W. HIATT & MARTHA ANN HIATT,
respondents.

Depositions of sundry witnesses taken before me, S. B. Williams, a commissioner of said circuit court of the United States in and for the district of Kansas, on the 22nd day of May, A. D. 1869, between the hours of 8 a. m. and 6 p. m. at the office of S. B. Williams, in Leavenworth City, in said county, pursuant to , to be read in
108 evidence on behalf of the complainant in said action.

ROBERT CROZIER, of lawful age, being by me first duly examined, cautioned, and solemnly sworn to testify the truth, the whole truth, and nothing but the truth, deposeth and saith:

I am acquainted with Benajah W. Hiatt, and have been for the nine or ten years last past. I became acquainted with Edward S. Brown within the last year. I was district attorney of the United States for the district of Kansas during the year 1863. Early in that year Benajah W. Hiatt visited me at my office in this city for the purpose, as he said, of informing me that one Edward S. Brown had large credits against persons living in this State, secured by mortgages on real estate, which credits were subject to confiscation, the said Brown being a rebel, (as he expressed it.) Enumerating the debtors of Brown, he stated that he himself owed Brown a considerable sum of money, the amount of which I cannot now state, which was secured by a mortgage upon the farm which he then lived on. He said that he owed Brown the amount
109 of money the mortgage was given to secure, but that he would much rather pay it to Government than to Brown. Hiatt's statement to me was the first intimation I had of any credits of Brown subject to confiscation. I do not pretend to say that this was Mr. Hiatt's exact language, but it is substantially what he did say. Upon this suggestion I examined the records of the register of deeds of Leavenworth County, and found therein mortgages to Brown substantially as Hiatt

said I would find, and among them a mortgage by himself and wife to Brown. Hiatt having informed me that Brown had loaned large sums of money to men living in Atchison County, I caused the records there to be examined, and found a number of mortgages to Brown recorded there. I forthwith instituted proceedings in the district court of the United States for this district for the confiscation of these credits to the United States, including the supposed debt of Hiatt to Brown.

Cross-examination:

110 After the decree of condemnation against these credits of Brown, process was issued against the mortgagors requiring them to show cause why judgment should not go against them in favor of the United States for the amount mentioned in the mortgages. Hiatt answered that he either had paid, or had settled the claim against him with Brown himself. Upon the trial of this question before the court Hiatt produced what purported to be a letter from Brown to him, the substance of which was, that when Hiatt should convey some piece of property in this city to Brown, or should cause to be discharged some lien upon property in this city, that the claim of Brown vs. Hiatt, secured by the mortgage aforesaid, should be considered settled. Hiatt testified that the conditions mentioned in the letter had been complied with by him; whereupon I either discontinued proceedings against him, or suffered a decree to go in his favor; which, I cannot now recollect.

Re-examined:

111 I had never seen Mr. Brown's handwriting, and did not, of my own knowledge, know whether the letter produced by Hiatt was his (Brown's) handwriting or not. All the testimony upon that subject was that of Mr. Hiatt alone.

ROBERT CROZIER.

I, S. B. Williams, a commissioner of the circuit court of the United States for the district of Kansas, do hereby certify that Robert Crozier was by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, and that the deposition by him subscribed, as above set forth, was reduced to writing by myself, in the presence of said witness, and was subscribed by him in my presence, and was taken at the time and in the place in the annexed notice specified; that I am not counsel, attorney, or relative of either party, or otherwise interested in the event of this suit.

S. B. WILLIAMS,
Com'r C. Court U. S. District of Kansas.

Fees, $2 25, paid by claimants attorney.

S. B. WILLIAMS.

112 In the circuit court in and for said district.

UNITED STATES OF AMERICA,
District of Kansas, ss:

EDWARD S. BROWN, PL'FF,
vs.
BENAJAH W. HIATT & MARTHA ANN HIATT, def'ts.

The said defendants will take notice that, on Saturday, the 22nd day

of May, A. D. 1869, the plaintiff above named will take the depositions of sundry witnesses, to be used as evidence on the trial of the above cause, at the office of S. B. Williams, in the city and county of Leavenworth, in the State of Kansas, between the hours of eight o'clock a. m. and six o'clock p. m. of said day, and that the taking of the same will be adjourned from day to day, between the same hours, until said depositions are completed; and it is agreed that depositions may be taken without commission or interrogatories, and without regard to issue *journed.*

GREEN & FOSTER,
Att'ys for Pl'ff.

113 Service of the above notice is acknowledged this 19th day of May, A. D. 1869.

H. GRISWOLD,
Att'y for Def'ts.

(Endorsed:) 107. Edward S. Brown vs. B. W. Hiatt & Martha A. Hiatt. Deposition of Judge Crozier.

(Endorsed on envelope:) To the clerk of the circuit court of the United States for the district of Kansas, at Topeka, Ka's. No. 107. Edward S. Brown vs. Benajuh W. Hiatt and Martha Ann Hiatt. Depositions on behalf of the defendants, taken by S. B. Williams, U. S. com'r. No. 107. Filed May 22, 1869. A. S. Thomas, clerk.

(Deposition endorsed:) Opened at the instance of H. T. Green & Hiram Griswold, attorneys, March 23d, 1870. A. S. Thomas, clerk.

And on this day, to wit, the 24th day of May, A. D. 1869, came the said defendants, by their solicitor, and filed in the said clerk's office, their motion to strike amended pleadings from files, which motion, with the endorsements thereon, is in the words and figures following, to wit:

114 In the circuit court of the United States for the district of Kansas.

EDWARD S. BROWN
vs.
BENAJAH W. HIATT & MARTH' ANN HIATT.

And now come the defendants, by H. Griswold, their attorney, and move the court to suppress and strike from the files of the court the papers filed by the plaintiff herein, designated as amended petition or amended bill, for the reason that they were improperly filed, are not proper pleadings in the case to succeed the original petition, and are not such amended pleadings in the case as the plaintiff had leave to file under the order of this court, made at the May term, 1868, thereof, giving leave to file amended petition.

H. GRISWOLD,
Att'y for Defendants.

(Endorsed:) No. 107. Edward S. Brow' vs. Benajah W. Hiatt & Martha Ann Hiatt. Motion to strike amended pleadings from the
115 files. Filed May 24, 1869. A. S. Thomas, clerk.

In the circuit court.

UNITED STATES OF AMERICA,
District of Kansas:

EDWARD S. BROWN
vs.
BENAJAH W. HIATT & MARTHA ANN HIATT.

Hiram Griswold, being duly sworn, doth depose and say that the paper filed in this case, purporting to be an answer, was not filed by him, he being sole attorney for defendants in the case, or by either of the defendants, or by the order or the consent of himself or of either of the defendants, but was filed by H. T. Green, the attorney for the plaintiff.

He further says that, at the time of filing said paper, it had not been signed by the defendant Martha Hiatt, the owner of the land alleged in the plaintiff's petition to have been mortgaged by her to the plaintiff, had not been sworn to by either of the defendants, and had not been signed by defendant's counsel. Affiant says said paper was
116 intended to be used, if at all, as an answer to a paper which plaintiff had drawn and delivered to this affiant, and which he said he intended to file, but which has not yet been filed, as a second amended bill. The said paper, called an answer, was delivered by affiant to said H. T. Green, solely to enable him to obtain a copy of it to transmit to the plaintiff, and not with any intention that it should be filed as an answer to the amended bill or amended petition then on file, or any knowledge that it would be filed by said Green.

H. GRISWOLD.

Sworn to by the said Hiram Griswold, before me, and subscribed by him in my presence, May 24, 1869.

A. S. THOMAS, *Clerk.*

(Endorsed:) No. 107. Edward S. Brown vs. Benajah W. Hiatt. Affidavit on motion strike amended petition from files. Filed May 24, 1869. A. S. Thomas, clerk.

117 At a term of the circuit court of the United States in and for the district of Kansas, began and held at Topeka, in said district, on Monday, the 24th day of May, A. D. 1869, among other proceedings, the following were had on Tuesday, May 25th, 1869, which appear of record in the words and figures following, to wit:

EDWARD S. BROWN
vs.
BENAJAH W. HIATT & MARTHA ANN HIATT. } 107. In equity.

This case came on for a hearing upon the motion of the defendants to strike the amended bills of the plaintiff from the files, and was argued by counsel. On consideration whereof the motion is overruled, and by consent of parties this case is continued.

And on this day, to wit, the 15th day of May, 1869, came the defendants, by their solicitor, and filed in the said clerk's office the depositions of W. B. Hiatt & wife, which depositions, together with the endorsements thereon, is in the words and figures following, to wit:

118 In the circuit court of the United States in & for the district of Kansas.

EDWARD S. BROWN, PL'FF,
ag't
BENAJAH W. HIATT & MARTHA ANN HIATT,
def'ts.

Depositions, taken before me, S. B. Williams, commissioner of said circuit court of the United States for the district of Kansas, on the 19th day A. D. 1869, between the hours of eight a. m. and six p. m., at the office of the probate court of Leavenworth County, Kansas, in the city of Leavenworth, pursuant to the annexed notice, to be read in evidence on behalf of the defendant in said action.

BENAJAH W. HIATT, of lawful age, being first duly examined, cautioned and solemnly affirmed, according to law, to testify the truth, the whole truth, & nothing but the truth, deposes and says:

I am one of the defendants in the above-entitled action, and one of the makers to the note upon which suit was brought in said action. The consideration of said note was $2,000 00.

Question of pl'ff. What arrangement, if any, was made for the payment of said note, and what security was given?

Answer. There was a mortgage given upon the land mentioned
119 in the bill, and a note and mortgage against John H. Kenyon for $800, & also a judgment against Geo. W. Perkins, secured by mortgage upon a house and lot in Leavenworth City, Kansas. There was a verbal agreement between the plaintiff and myself that whenever I requested it he would take the Kenyon note, and mortgage, and the judgement against Perkins, and release the mortgage from me to him above-mentioned.

Question by same. Did you ever inform him of any determination of yours in regard to the matter?

Answer. I did by letter, but do not recollect the date, as I made no note of it, and kept no copy. It was during the rebellion I wrote to him that I wished to pay it off, and was ready to do it. I also went to see Mr. Green, now plaintiff's counsel, to see him, and to know where the plaintiff was, as I did not know & could hear nothing from him. I afterwards got a letter from the plaintiff some time before the close of the rebellion.

Question by the same. Did you ever make known to the pl'ff your request or election as to the claim against Kenyon & Perkins, & if so, when, how, and what was it?

120 Answer. I wrote to him during the rebellion that he could take the claims against Kenyon & Perkins, and release the other as he had agreed. I do not recollect the exact time of this notice.

Question by same. Did you ever receive from the plaintiff an answer to that ietter?

Answer. I did.

Question. Are you acquainted with the plaintiff's handwriting?

Answer. Yes; that letter was in his handwriting?

Question. Where is that letter?

Answer. I do not know. It was at the court at Topeka, and produced at that court, but it is lost somehow. I cannot find it among my papers. I have searched through all my papers—all the papers about the place.

The court alluded to was the United States court at Topeka, and the case, in which it was used, was an action to confiscate property of the plaintiff.

Question by same. State the contents of pl'ff letter.

Answer. He stated in the letter that he was willing to stand up to the contract—take the Kenyon & Perkins claims, and release
121 the other mortgage, and would do so as soon as he could.

Question. Give the date of the letter and the place where mailed.

Answer. It was from the State of Virginia, but the post office I cannot recollect, to tell you. I cannot give the date at all; I do not remember. The land covered by the Kenyon mortgage was worth 2,500 00. I have never had the Kenyon note & mortgage in my possession since I assigned them to plaintiff. The Perkins property was worth 3,500. I have never received any of the rents and profits of the Perkins property, nor have I had any control of it since the assignment of it to the plaintiff.

Cross-examined:

Question by def't. In what particular case of the United States vs. Brown, and against which of his debtors was that letter of pl'ff used, and who had charge of the case in behalf of the United States, and who, in behalf of the debtors?

Answer. It was in the case of the United States vs. Brown, to confiscate the debt of myself and wife, and Edward S. Brown; if I
122 remember right, Judge Crozier appeared for the United States, and Judge Gambell for myself.

Question. How was the letter used?

Answer. I do not know how the letter was used, whether set out in the pleadings or used in evidence. It was used in one way or the other. I cannot tell how long before that I rec'd the letter.

Question. Was it one month before—two months or six months, or a greater length of time?

Answer. I could not tell you.

Question. Give your best recollection of the time.

Answer. I have no best recollection of the time.

Question. If you have no best recollection, give your poorest recollection or any recollection you have of the matter.

Answer. I cannot give any other answer than I have done, as I cannot recollect anything about the date. I received the letter at the Leavenworth post office; it was mailed and dated in Virginia.

Question. How long was it after you had written to him before you rec'd his answer?

Answer. I cannot recollect that either.

Question. To whom and to what post office did you direct your
123 letter, signifying your desire that he should take the Perkins & Kenyon claims?

Answer. I directed it, I think, to Edward S. Brown, and to Sunnyside post office, Virginia.

Question. Give, as near as you can, what you wrote in that letter to Edward S. Brown.

Answer. I do not remember the words, but the substance was that I wanted him to take the Perkins & Kenyon claims, as agreed.

Question. State the language of the reply.

Answer. I never received an answer from him to that letter.

Question. Give, as near as you can, the language of the letter rec'd from him, that was read in court at Topeka, as you have stated.

Answer. He simply stated in that letter that he was willing to settle with me, according to our agreement, & would do so as soon as he could. He said that he was willing to release our property (the farm) that we lived on, & take the Perkins and Kenyon property, as we had agreed before.

Question. Did you have any conversation with Robert Crozier,
124 then U. S. district attorney, in relation to Edward S. Brown & his connection with the rebellion; if so, what?

Answer. The question was put to me by Judge Crozier whether I knew anything of Edward S. Brown—whether he was a rebel or not. I told him he was.

Question. Was it before or after you received plaintiff's letter that this conversation with Judge Crozier took place?

Answer. If I remember right I had that letter in my possession when that conversation took place.

Question. What evidence had you that Brown was a rebel?

Answer. When Brown was at my house, when the money was borrowed, at the date of the note—at the dinner table, he asked me if I was going to vote for Abraham Lincoln. I told him I was, and if I had forty votes I would cast them for him. He replied to me "If you elect him, we, Virginians, will never let him take his seat." That was all the conversation I had with him personally upon that matter. This was the special reason for my making the statement to Judge Crozier, and besides this I had been told by a man at Pardee, in Atchison County,
125 that Brown had been in the rebel army. This man I had never seen before; I have never seen him since, and do not know his name, and did not, and do not know where he lives. I have had my home and family here, in Leavenworth County, Kansas, since the note to Brown was given.

Question. How late have you written to Brown, acknowledging this debt?

Answer. I cannot tell anything about it.

Question. When and where did you make any inquiry of H. T. Green, in relation to paying the Brown debt?

Answer. I went to him after the rebellion commenced, as I could get no letter from Brown.

Question. Did you not call upon him with Kenyon to see about paying the Kenyon claim and getting the mortgage released?

Answer. I do not remember that I did, but might have done so. Kenyon sold his land during the rebellion, & went back to Indiana.

Question. When did George W. Perkins leave Kansas, and what was his peculiar condition, & where did he go?

126 Answer. He went to Denver City before the rebellion, and at that time had no property, within my knowledge, except the property in Leavenworth County, mortgaged as above stated.

Re-examined by defendant's att'y:

On page 6 of your deposition, you have given this answer to a question: "I never received an answer from him to that letter." Do you wish to make any explanation as to that answer?

Answer. I do. There were three letters written by me to Mr. Brown that I never received answer to. I supposed Mr. Green alluded to one of those letters when he asked that question; I did receive an answer to that letter requesting him to release the mortgage I gave him and

take the Perkins & Kenyon claims, and this answer was the letter used in the court at Topeka, as before stated.

B. W. HIATT.

At the same time and place came MARTHA ANN HIATT, of lawful age, who, being by me first duly examined, cautioned, and solemnly affirmed to testify the truth, the whole truth, and nothing but the truth, deposeth and saith:

127 I am one of the defendants in the above-entitled action; I was present when Mr. Hiatt, def't, got the money for the note upon which suit was brought in said action. I know that Mr. Hiatt gave other securities to plaintiff besides the mortgage upon our land—a mortgage of $800 00 against John H. Kenyon and the Perkins property in the city of Leavenworth. Mr. Brown agreed to take said Perkins & Kenyon claims at any time Mr. Hiatt said so, & release our mortgage to him. My husband wrote a letter to Mr. Brown in relation to his taking those claims. I am not certain whether I saw the letter, or whether he told me that he had written it. I think it was in the summer of 1862, but am not sure. He received an answer from Mr. Brown, plaintiff; I saw it.

Question. State the contents of that letter.

(Objected to by plaintiff.)

Answer. Pl'ff said, in his letter that I spoke of, that he would take those claims at any time, and release the mortgage we gave; that he simply wanted the mortgage on our place as collateral security.

Cross-examined:

There was a written contract between the plaintiff and Mr. Hiatt. I do not know whether there was any other written contract besides
128 the assignment of the claims above spoken of; I do not think the agreement, as to Mr. Brown's taking the Perkins & Kenyon claims and release the mortgage upon our property, was in writing; I was not present during the entire conversation between the parties in relation to that transaction. At the date of the borrowing of the money, for which the note was given, upon which suit was brought in this action, Mr. Brown dined at our house. On that occasion Mr. Brown said something about the Virginians not letting Abraham Lincoln take his seat if elected President, but I do not recollect just the language; I don't think Mr. Brown was ever at our house at any other time.

MARTHA ANN HIATT.

I, S. B. Williams, a commissioner of the circuit court of the United States in and for the district of Kansas, do hereby certify that Benajah W. Hiatt and Martha Ann Hiatt were by me first severally affirmed to testify the truth, the whole truth, and nothing but the truth,
129 and that the depositions by them respectively subscribed, as above set forth, were reduced to writing by myself, in presence of witnesses respectively, and were respectively subscribed by the said witnessess in my presence, and were taken at the time in the annexed notice specified; that I am not counsel, attorney, or relative of either party, or otherwise interested in the event of this suit.

S. B. WILLIAMS,
U. S. Commissioner.

Costs of deposition $3 50. Paid by def't.

130 UNITED STATES OF AMERICA,
District of Kansas:

In the circuit court in and for said district.

EDWARD S. BROWN, PL'FF,
ag't
BENAJAH W. HIATT & MARTHA ANN HIATT,
def't.

The said plaintiff will take notice that, on Tuesday, the 19th day of May, A. D. 1869, the defendants above named will take the depositions of sundry witnesses, to be used as evidence on the trial of the above cause, at the office of Griswold & Britton, in Leavenworth, in the county of Leavenworth, in the State of Kansas, between the hours of eight o'clock a. m., and six o'clock p. m. of said day, and that the taking of the same will be adjourned from day to day between the same hours until said depositions are completed.

And it is agreed that depositions may be taken without commission or interrogatories, & without regard to issue joined.

H. GRISWOLD,
Attorney for Def'ts.

131 Service of the above notice is acknowledged this 15th day of May, A. D. 1869.

GREEN & FOSTER,
Attorney for Pl'ffs.

(Envelope containing deposition endorsed:) No. 107. Deposition of B. W. Hiatt & wife. Filed May 25, 1869. A. S. Thomas, clerk. Edward S. Brown vs. Benajah W. Hiatt & Martha Ann Hiatt. In the circuit court of the U. S., district of Kansas. Taken by S. B. Williams, com'r of said court. To the clerk of the circuit court of the United States, district of Kansas, Topeka.

(Deposition endorsed:) Opened at the instance of H. T. Green and Hiram Griswold, March 23, 1870. A. S. Thomas, clerk.

132 At a term of the circuit court of the United States of America, in and for the district of Kansas, began and held at the City of Topeka, in said district, on Monday, November 22nd, 1869, there were present Hon. Mark W. Delahay, judge of said court.

At which term of said court, on Tuesday, November 23rd, 1869, among other proceedings, the following were had and appear of record, in words and figures following, to wit:

TUESDAY, *November 23rd*, 1869.

EDWARD S. BROWN
vs.
BENAJAH W. HIATT & MARTHA ANN HIATT.

By consent of parties it is ordered by the court that this case be continued to the next term of this court.

And on this day, March 21st, A. D. 1870, came the same complainant and defendants, by their solicitors, and filed in the said clerk's
133 office their stipulation to open deposition, which said stipulation is in the words and figures following, to wit:

UNITED STATES OF AMERICA,
District of Kansas:

In the circuit court of the United States for the district of Kansas.

EDWARD S. BROWN
vs.
MARTHA ANN HIATT & BENAJAH W. HIATT,
def'ts.

It is agreed that all depositions on file in this cause may be opened by the clerk of said court without further order.

H. T. GREEN,
Att'y for Pl'ff.
H. GRISWOLD,
Att'y for Def'ts.

(Endorsed:) No. 107. Edward S. Brown, pl'f, vs. M. A. & Benaj. Hiatt, d'f't. Stipulation of solicitors to open deposition. Filed M'ch 21, 1870. A. S. Thomas, clerk.

134 And on this day, to wit, the 12th day of April, A. D. 1870, came the said defendants, by their solicitor, and filed in the said clerk's office the deposition of A. M. Sawyer, which deposition, together with the endorsements thereon, is in the words and figures, following, to wit:

In the circuit court.

UNITED STATES OF AMERICA,
District of Kansas:

EDWARD S. BROWN
vs.
BENAJAH W. HIATT & MARTHA ANN HIATT.

The deposition of Augustus M. Sawyer, to be used on the trial of this action, taken at the instance of the complainant, by consent of parties, without notice or commission.

The said AUGUSTUS M. SAWYER, being first duly sworn, did depose and say that he resides in Leavenworth, Kansas, and is a prac-
135 ticeing attorney there, and was in the years 1860 & 1866. In the spring of 1860, said Hiatt retained him and his partner, D. H. Bailey, as his attorneys, to attend to his business generally. After this, sometime in the summer or fall of 1860, said Hiatt called upon them in regard to a judgment he had in the district court of Leavenworth county, Kansas, against Geo. W. Perkins. The judgment at that time had been assigned to said Edward S. Brown, and said Hiatt desired us to have certain property sold under that judgment. The property was, lot 20, block 15, in Leavenworth. He directed us to have it sold and bought in in the name of Edward S. Brown. My best
136 recollection is that, in reply to my inquiry, by what authority he requested us thus to dispose of this business, he said he was authorized by said Brown to have the business done in that manner. I did not know Brown and do not know as I have ever seen him. I think my partner did not know him. We did take charge of the busi-

ness, had an order of sale issued, and ultimately the property was struck off to said Brown, the business being transacted under our direction. The only communication that I remember we had from said Brown, was a letter received from him, of which the following is a copy.

"SUNNYSIDE, CUMBERLAND CO., VA.,
"14*th Jan.*, 1861.

"Messrs. SAWYER & BAILY.

"GENT.: I am informed that you are counsel for Mr. Hiatt in the suit vs. G. W. Perkins, to foreclose a mortgage. Mr. Hiatt, by entering on the records, assigned the judgment to me as collateral security to a mortgage by himself and wife, to secure a debt, $2,400. When the property is sold, please inform me. My p. office is Sunnyside,
137 Cumberland County, Virginia, and much oblige,

"Yours very respectfully,

"EDWARD S. BROWN."

It was the understanding of our firm that Hiatt was to pay the costs, but I cannot say whether I learned that from him or from my partner, and I know that the officers of court look to him for payment of the costs.

In reply to the letter rec'd by us from said Brown, we wrote him one, a copy of it is hereto attached, and marked "A."

I have no recollection of any other communication having passed between us.

A. M. SAWYER.

UNITED STATES OF AMERICA,
District of Kansas, ss:

I, Z. E. Britton, United States commissioner, hereby certify, that Augustus M. Sawyer, who has given the foregoing deposition, was by me first sworn to testify the truth, the whole truth, and nothing
138 but the truth, and that the same was taken by counsel and reduced to writing by Hiram Griswold, by consent of the parties, on the 26th day of May, 1868.

Z. E. BRITTON,
U. S. Commissioner.

"A."—*Exhibit refered to in the deposition of A. M. Sawyer.*

LAWRENCE, *Jan.* 31*st*, 1861.

EDWARD S. BROWN, Esq.

DEAR SIR: Yours of the 14th inst. reached us a few days ago, but on account of absence from home we have not had an opportunity to reply. We would say that the property referred to was sold on the 16th inst., in pursuance to advertisement, and purchased by us as your attorneys, under the direction of Mr. Hiatt. The property did not sell for an amount sufficient to cover the judgment. The price paid was
$933 35. Mr Hiatt has promised to furnish money sufficient to
139 pay the costs due the officers, so that the sale can be confirmed.

The residue of the judgment will stand against Perkins, and if any other property can be found the residue can still be made. If Hiatt fail to raise the amount, which will be about $100 00, it will be to your advantage to do so. The property is worth more than the sum at which it was bid off, and will rent for at least $20 00 per month. Our laws re-

quire that property sold must bring two-thirds of its appraised value; otherwise there can be no sale. We considered it for your and Hiatt's interest to bid it in, so that we could collect the rent and take steps to protect the property. The property is a much better security than the decree of foreclosure. Any letter you may send should be directed as usual to Leavenworth, as in a day or two Mr. Sawyer will be at home. Hoping to hear from you at your earliest convenience, we remain respectfully yours, &c.,

SAWYER & BAILEY.

140 (Endorsed envelope:)

To the clerk of the U. S. court, Topeka, Kan.:

It is agreed that the enclosed papers shall be filed with the clerk, and are to be used in evidence, so far as competent, without reference to formality in taking or filing them.

H. T. GREEN,
For E. S. Brown.
H. GRISWOLD,
For Def'ts.

Filed Apr. 12, 1870, A. S. Thomas, clerk. No. 107.

(Endorsed further:) 107. Edward S. Brown vs. Benajah W. Hiatt & Martha Ann Hiatt. Deposition of A. M. Sawyer. Opened at instance of H. T. Green and Hiram Griswold, att'y, as per stipulations on file, Apr. 16, 1870. A. S. Thomas, clerk.

And on this day, to wit, the 27th day of April, A. D. 1870, came the plaintiff, by his solicitor, and filed in the said clerk's office "copy of answer of B. W. Hiatt, filed in confiscation suits No. 140 & 141," which copy, together with the endorsements thereon, is in the words and figures following, to wit:

141 In the district court of the United States for the district of Kansas.

In the matter of the information filed on behalf of the United States of America, by Robert Crozier, esq., the attorney of the said United States, for said district, against lot 20, in block 15, in the city of Leavenworth, and certain bonds and mortgages therein designated as the property of Edward S. Brown, and claimed to be forfeited to the United States. The answer of Benajah W. Hiatt and Martha Hiatt, to the said information.

Now comes the said Benajah W. Hiatt and Martha Hiatt, his wife, and for answer to the said information, allege and propound as follows:

First. That they made, executed, and delivered to the said Edward S. Brown, as stated in said information, the said bond and mortgage therein described.

142 Second. That they are not, and have not been, at any time since on or about the day of May, 1861, indebted to the said Edward S. Brown on said bond and mortgage, in any sense whatever.

Third. And the said defendants further allege and propound that

at the time said bond and mortgage in said information described were made, executed, and delivered to said Edward S. Brown, this respondent, Benajah W. Hiatt, owned and held a mortgage for about nine hundred dollars, dated about the 9th day of April, 1859, drawing interest at the rate of twenty-five per cent. per annum, due one year from date, upon a certain house and lot in the city of Leavenworth, county of Leavenworth, Kansas Territory, owned by one Geo. W. Perkins, which said property was ample security for the payment of the principal and interest mentioned in said mortgage; that a suit was then pending in the district court for said county of Leavenworth against said Geo. W. Perkins and others for the foreclosure of said mortgage; that the
143 respondent Benajah W. Hiatt at the same time held and owned a certain other mortgage against one J. H. Kenyon, on the following-described property situate, lying, and being in the county of Leavenworth, aforesaid: The southeast quarter of section 30, in township nine, (9,) of range 21, for the sum of eight hundred dollars, dated about the day of October, 1858, due two years after date, and drawing interest after due at the rate of ten per cent. per annum, which said land was ample security for the payment of said mortgage.

And these respondents further allege that it was then, to wit, at the time the said mortgage in said information described was executed and delivered, agreed between said Edward S. Brown and this respondent Benajah W. Hiatt, that this respondent Benajah W. Hiatt should assign said Kenyon mortgage to said Edward S. Brown; that the said house and lot in the city of Leavenworth should be sold under the decree of the said district court of the county of Leavenworth, when rendered; that said Edward S. Brown should become the purchaser
144 thereof at such sale, and that when such sale should be confirmed the said house and lot so to be purchased, and said Kenyon mortgage, should be taken, considered, and treated as a full payment and satisfaction of said bond and mortgage in said information described, and that he, the said Edward S. Brown, should and would thereupon surrender said bond to these respondents and release the said mortgage of record. And these respondents allege that, thereupon the respondent Benajah W. Hiatt, in pursuance of said agreement, duly assigned, transferred, and delivered to said Edward S. Brown the said Kenyon mortgage and the note to which the same was collateral; that the said suit in the district court for the county of Leavenworth was duly prosecuted for final judgment; the said house and lot duly ordered to be sold to satisfy the amount due on said mortgage as aforesaid; that, under such decree the said house and lot were sold at public sale by the sheriff of Leavenworth, and on such sale the said Edward S.
145 Brown the purchaser; that such sale was, by the said district court for the county of Leavenworth, duly confirmed, on or about the day of May, 1861; and a deed of said premises was thereupon duly executed by the said sheriff to the said Edward S. Brown.

And so these respondents aver that the said bond and mortgage have, in the manner aforesaid, been fully paid and satisfied; that the said bond has never been delivered, and the said mortgage has never been released of record.

And these respondents further allege that they have not seen, and have not been able to hold any communication with, said Brown since the said sale was, as aforesaid, confirmed, and that he has never reassigned the said Kenyon mortgage or offered to do so to these respondents or either of them.

Wherefore these respondents pray the court to pronounce against the forfeiture in the said information demanded.

146 BENAJAH W. HIATT.
MARTHA ANN HIATT,
By B. W. HIATT.

W. P. GAMBELL,
Proctor for Respondents.

Benajah W. Hiatt, one of the above-named respondents, being duly affirmed, says that the facts, matters, and things set forth in the foregoing answer are true in substance and in fact.

BENAJAH W. HIATT.

Subscribed and affirmed before me this 26th day of June, 1863.
JOHN T. MORTON, *Clerk.*

(Endorsed:) United States vs. Lot 20, in block 15, et alias. Ans. of B. W. Hiatt & Martha Hiatt. Filed May 26, 1863. John T. Morton, clerk. W. P. Gambell, proctor for resp't.

UNITED STATES OF AMERICA,
District of Kansas, ss:

I, A. S. Thomas, clerk of the district court of the United States for said district, do hereby certify that the above and foregoing is a
147 true and correct copy of the answer of Benajah W. Hiatt and Martha Ann Hiatt, filed in the clerk's office of said court, May 26, 1863, in the case of the United States vs. Lot 20, in block 15, et al., as the same remains on file in said clerk's office.

In testimony whereof I hereunto set my hand and affix the seal of said court at my office, in Topeka, in said district, this 19th day of April, A. D. 1870.

[SEAL.] A. S. THOMAS, *Clerk.*

(Indorsed:) United States vs. Lot 20, in block 15, et al. Copy of ans. of B. W. Hiatt & Martha Hiatt.

(Endorsed:) 107. Edward S. Brown vs. Benajah W. Hiatt & Martha Ann Hiatt. Copy of answer of B. W. Hiatt, filed in confiscation suit No. 140 & 141. Filed as an exhibit by the plaintiff, April 27, 1870. A. S. Thomas, clerk.

148 And on this day, to wit, the 27th day of April, A. D. 1870, came the defendants, by their solicitor, and filed in the said clerk's office "Abstract from decree of June 5, 1863, in No. 140 & 141, dismissing as to Hiatt," which abstract, together with the endorsement thereon, is in the words and figures following, to wit:

At a term of the district court of the United States of America in and for the district of Kansas, begun and held at Topeka, in said district, on Monday, the 13th day of April, A. D. 1863—present, Hon. Archibald Williams, judge—proceedings were had and appear of record in words and figures as follows, to wit:

FRIDAY, *June* 5, A. D. 1863.

And, on like motion, it is further ordered, adjudged, and decreed by the court that, as to the bond for the payment of $2,400 00 in twelve

months after the date thereof, with interest after maturity, at
149 the rate of 20 per cent. per annum, executed May 29, 1860, by Benajah W. and Martha Ann Hiatt, to said Edward S. Brown, and recorded in the office of the register of deeds of Leavenworth County, Kansas, May 29, 1860, in book "L," page 476, on the following real estate in said Leavenworth County, viz, the east half of section 22, in township 9, of range 20, in the information in this cause described, this cause and the information herein be, and the same is hereby, dismissed without prejudice.

UNITED STATES OF AMERICA,
District of Kansas, ss:

I, A. S. Thomas, clerk of the district court of the United States for said district, do hereby certify that the above and foregoing is a true and correct copy of an extract of an entry in case No. 140 & 141, consolidated, duly recorded under date of June 5, A. D. 1863, on page 509, in book A, of the records of said district court.

150 In testimony whereof I hereunto set my hand and affix the seal of said court at my office, in Topeka, in said district, this 23d day of April, A. D. 1870.

[SEAL.] A. S. THOMAS, *Clerk.*

(Endorsed:) 107. Edward S. Brown vs. Benajah W. Hiatt & Martha Ann Hiatt. Abstract from decree of June 5, 1863, in No. 140 & 141. Dismissing as to Hiatt. Filed as an exhibit by the plaintiff, April 27, 1870. A. S. Thomas, clerk.

And on this day, to wit, the 27th day of April, A. D. 1870, came the defendants, by their solicitor, and filed in the said clerk's office an "Abstract & copies in confiscation suit ag't note of $800, etc," which abstract, &c., together with the filings thereon, is in the words and figures following, to wit:

THE UNITED STATES
vs.
A NOTE FOR $800, PAYABLE TO BENAJAH W.
Hiatt on the 25th of December, 1860,
151 made by John H. Kenyon, on December 11, 1858, with interest at 6 per cent. per annum from date, secured by mortgage executed by said John H. Kenyon and Anestha W. Kenyon, his wife, on May 13, 1859, and recorded in the office of the register of deeds of Leavenworth County, State of Kansas, in book L, on pages 119 & 120, on the southeast quarter of section 30, in township 9, of range 21, in Leavenworth County, Kansas, which note and mortgage was, on the 29th day of May, 1860, assigned by Benajah W. Hiatt to Edward S. Brown.

In this suit an information was filed in the office of the clerk of the district court of the United States for the district of Kansas, the 10th of September, 1863, against a note for $800, payable to Benajah W.
Hiatt on the 25th of December, 1860, made by John H. Kenyon
152 on December 11, 1858, with interest at 6 per cent. per annum from date, secured by mortgage executed by said John H. Kenyon and Anestha W. Kenyon, his wife, on May 13, 1859, and recorded in the office of the register of deeds of Leavenworth County, State of Kansas,

in book L, on pages 119 & 120 on the southeast quarter of section 30, in township 9, of range 21, in Leavenworth County, Kansas, which note and mortgage was, on the 29th day of May, 1860, assigned by said Benajah W. Hiatt to Edward S. Brown, and praying that said John H. Kenyon, and Louis F. Arberg, and Herman A. Arberg may be cited and notified to show cause, if any they have, why the said John H. Kenyon should not be decreed to pay the amount of said note to the United States of America. And on the said 10th day of September, 1863, a warrant and citation was issued by the clerk of said court to the marshal of the United States for the district of Kansas, commanding
153 him to attach the said note and mortgage, rights, and credits, and all the interest therein belonging to said Edward S. Brown.

On which the marshal made the following return:

Received the within warrant Sept. 10th, 1863. In obedience to the same, I have attached, arrested, and detained the following note, and rights, property, credit, and effect of Edward S. Brown, to wit, a note for $800, given by John S. Kenyon to Benajah W. Hiatt, dated December 11, 1858, payable Sept. 25, 1860, with 6 per cent. per annum int. from date, and assigned to Edward S. Brown May 29, 1860, secured by mortgage executed by John H. Kenyon and Anestha W. Kenyon, his wife, on May 15, 1859, on the southeast quarter of section 30, town 9, range 21, Leavenworth Co.; said mortgage also assigned to Edward S. Brown by Benajah W. Hiatt May 29, 1860, within mentioned, and have cited and notified Benajah W. Hiatt, Martha Ann Hiatt, John H. Kenyon, Anestha W. Kenyon, Louis F. Arberg, and Herman A. Arburg, and all other persons having or pretending to have any right,
154 title, or interest therein, as by the said warrant I am commanded to do. I also caused a copy of the annexed notice to be publishd for 14 days from and after September 6th, 1863, in the Leavenworth Weekly Bulletin, the newspaper published nighest to the property seized, as aforesaid; also caused a copy to be posted on the court-house door, in Topeka, Sept. 6, 1863.

Dated Leavenworth, this 19th day of October, A. D. 1863.

JAMES L. McDOWELL,
Marshal of the United States for the District of Kansas.

Marshal's fees: Miles 140, 14 00; service 6, 15; advertising, 2 50; posting, 2 50; printer, 10 00=$43 50.

And, on the 19th day of November, 1863, the said cause came on to be heard in the district court of the United States for the district of Kansas, and the following decree was rendered and entered of record.

155 THE UNITED STATES OF AMERICA
vs.
A NOTE FOR $800, PAYABLE TO BENAJAH W. Hiatt, on the 25th day of September, 1860, made by John H. Kenyon, on the 11th day of December, A. D. 1858, with interest at 6 per cent. per annum, from date, secured by mortgage executed by John H. Kenyon and Anestha W. Kenyon, his wife, on the 13th day of May, A. D. 1859, on the southeast quarter of section No. 30, t'p No. 9, R. No 21, in Leavenworth County, and State of Kansas, which note and mortgage was, on the 29th day of May, A. D. 1860, assigned by said Benajah W. Hiatt to Edward S. Brown.

The marshal having returned that he has duly attached the note, mortgage, and property above described, and given due notice to all persons claiming the same, that this court would, on the 20th day
156 of October, 1863, proceed to the trial and condemnation thereof should no claim be interposed for the same. And said John H. Kenyon, obligor and mortgagor in said note *in said note* and mortgage, in the information in this cause set forth and alleged, and Anestha Kenyon, his wife, who executed the said mortgage jointly with her said husband, having been duly served with the process of this court, and having failed to answer to the citation herein, it is ordered by the court that the allegations in the said citation and information herein be taken as confessed as against them, the said John H. Kenyon and Anestha Kenyon, and the court doth find that there is due from *from* the said John H. Kenyon *and* the said note the sum of ten hundred and thirty-seven dollars, secured by mortgage on the following-described real estate, situated in the county of Leavenworth, and State of Kansas, to wit, the southeast quarter of section No. 30, in t'p No. 9, R. 21, in Leavenworth County, and State of Kansas.

157 It is therefore ordered, decreed, and adjudged by the court, that the said John H. Kenyon pay into this court, to the clerk thereof, the said sum of , with legal interest from the date of this decree, within three months from this date; and that, in default thereof, the said real estate in the said mortgage described, situate in the county of Leavenworth, and State of Kansas, which the court doth find is charged with the payment of said note, to wit, the southeast quarter of section No. 30, t'p No. 9, range 21, in said county, be appraised, advertised, and sold by the marshal of the United States for the district of Kansas, under an order of sale to be issued from the office of the clerk of this court, according to the laws of the State of Kansas regulating sales under execution, and that execution issue against the said John H. Kenyon as upon judgments at law, for any remainder due upon this decree after applying the proceeds of said sale.

158 And it is further ordered and decreed that the said John H. Kenyon and Anestha W. Kenyon, and all persons claiming under them, be forever barred, and forever foreclosed of and from all equity of redemption, and all right, title, and interest of, in, and to the said mortgaged premises, from and after said sale.

And it is further ordered and decreed that the purchaser *of* said sale be let into the possession of said premises upon the production of the marshal's deed for the same.

THE UNITED STATES OF AMERICA,
District of Kansas, ss:

159 I, A. S. Thomas, clerk of the district court of the United States for the district of Kansas, do hereby certify that the foregoing is a true extract from the information and warrant and citation in the above-entitled cause, and true, full, and complete copies of the marshal's return on said warrants and citation, and of the decree of the court rendered in said cause, as the same appears of record in said office, and *in* find no other decree in said cause of record in said office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Topeka, in said district, this 20th day of April, A. D. 1870.

[SEAL.] A. S. THOMAS, *Clerk.*

(Endorsed:) 107. Edward S. Brown vs. Benajah W. Hiatt & Martha

Ann Hiatt. Abstracts & copies in confiscation suit ag't Note of $800, etc., filed as an exhibit by the plaintiff, April 27, 1870. A. S. Thomas, clerk.

160 And on this day, to wit, the 3rd day of May, A. D. 1870, came the plaintiff, by his solicitor, and filed in the said clerk's office "Agreed statements of facts as to Cockerill's prior lien on Perkins' lot, which took all the proceeds of sale," which statement, together with the endorsements thereon, is in the words and figures following, to wit:

In the circuit court United States for the district of Kansas.

EDWARD S. BROWN
vs.
BENAJAH W. HIATT & WIFE.

On November 28, 1862, Clinton Cockerill filed a petition in the circuit court of Leavenworth County, Kansas, against George W. Perkins, and said Edward S. Brown, & Benajah W. Hiatt, & others, to foreclose a mortgage made by said Perkins to said Cockerill, on lot 20, in block 15, in Leavenworth. Said mortgage was subsequent in date to the mortgage from said Perkins to said Hiatt, but in that action it was decided by the court that the acknowledgment of the deed to said Hiatt
161 was defective, and, by order of said court, said lot was sold and the whole of the proceeds of the sale were applied towards the payment of the debt from said Perkins to said Cockerill. In the decree in that action, the court decided and decreed that the claim of said Brown, and of said Hiatt, to said lot, was subordinate to the claim of said Cockerill.

EDWARD S. BROWN,
By H. T. GREEN,
His Att'y & Solicitor.
BENAJAH W. HIATT,
MARTHA ANN HIATT,
By H. GRISWOLD,
Their Att'y.

(Endorsed:) Edward S. Brown vs. Benajah W. Hiatt & Martha Ann Hiatt. Agreed statement of facts as to Cockerill's prior lien on Perkins' lot, which took all the proceeds of sale. Filed by pl'ff May 3, 1870. A. S. Thomas, clerk.

And on this day, to wit, the 3rd day of May, 1870, came the plaintiff, by his solicitor, and filed in the said clerk's office "Copy of
162 Kenyon's mortgage and the assignment to Edward S. Brown," which copy, with the endorsements thereon, is in the words and figures following, to wit:

Know all men by these presents that John H. Kenyon, of Leavenworth County, and Territory of Kansas, for and in consideration of ten hundred and ninety-five dollars, to him paid by Benajah W. Hiatt, of the same county and Territory, the receipt whereof is hereby acknowledged, doth hereby bargain, sell, and convey to the said Benajah W. Hiatt, his heirs and assigns, forever, the following described real estate, situated in Leavenworth County, Kansas Territory, to wit, the southeast quarter of section thirty, township nine, range twenty-one, of the Delaware trust lands of Kansas Territory, containing one hundred and sixty acres: To have and to hold the same to the said Benajah W. Hiatt, his heirs and assigns, forever: provided always, that if the said John H.

163 Kenyon shall cause to be paid unto Benajah W. Hiatt his two promissory notes—one for four hundred dollars, dated Kansas Territory, 12 mo., 11 d., 1858, payable and due on the Christmas day, in the year 1859; and the second for eight hundred dollars, dated Kansas Territory, 12 mo., 11 d., 1858, due and payable on Christmas day, 1860—bearing 6 per cent. from date, then these presents shall be null and void; otherwise to remain in full force and virtue in law.

In witness whereof the said John H. Kenyon has hereunto set his hands and seal the thirteenth day of the fifth month, in the year eighteen hundred and fifty-nine.

JOHN H. KENYON. [SEAL.]
ASENATH W. KENYON. [SEAL.]

Signed, sealed, and delivered in presence of—
JOSIAH HIATT.

TERRITORY OF KANSAS,
County of Leavenworth:

Be it known that, on this the thirteenth day of the fifth month, A. D. 1859, personally came before me, a justice of the peace in and for
164 said county and Territory, the signers and sealers of the foregoing mortgage, and acknowledged the same to be their own free act and deed. And Asenath W. Kenyon, wife of John H., upon examination by me separate and apart from her husband, acknowledged the same freely and of her own accord, for the purpose therein expressed, without fear or compulsion from any one.

WILLIAM PYLE, *J. P.*

Recorded November 2d, A. D. 1859, at 4¾ o'clock p. m.
SCOTT J. ANTHONY,
Register of Deeds.

On the margin of the record of the above mortgage is the following entry:

I hereby assign to Edward S. Brown the within mortgage, from John H. Kenyon and wife to me, as collateral security for the payment of a bond dated 29th May, A. D. 1860, payable twelve months after date, for two thousand four hundred dollars, signed by myself and Martha Ann, my wife, and made payable to Edward S. Brown.

165 Witness my hand and seal May 29th, A. D. 1860.

BENAJAH W. HIATT. [SEAL.]

Witness:
W. S. VAN DOREN,
Register of Deeds.

Also the following entry appears on the margin of the same record:

I hereby acknowledge satisfaction and full payment of the within note of four hundred dollars, with interest thereon, the said note being made by John H. Kenyon to me, and dated 12th month, 1858, & by him paid to me in full before the assignment of this mortgage to the said Edward S. Brown.

Witness my hand and seal this 5th day of June, 1861.

BENAJAH W. HIATT. [SEAL.]

Attest:
W. S. VAN DOREN,
Register of Deeds.
By W'M BUCHER, *Dep'ty.*

STATE OF KANSAS,
Office of Register of Deeds, Leavenworth County:

166 I, C. C. Mast, register of deeds in and for the county and State aforesaid, do hereby certify that the above and foregoing is a true and correct copy of a certain mortgage executed by John H. Kenyon and wife to B. W. Hiatt, and also the certificate of acknowledgment thereof, and of the date of record of the same, and also of the entries which are on the margin of the record of said mortgage as fully as the same appears in my office, in book "L," on pages 119 & 120.

Witness my hand and seal of office at Leavenworth, this 13th day of April, A. D. 1870.

{ REGISTER'S SEAL. }

C. C. MAST,
Register of Deeds.

[5-c't stamp.

STATE OF KANSAS,
County of Leavenworth, ss:

I, H. W. Ide, judge of the district court of the State of Kan-
167 sas, sitting in and for Leavenworth County, do hereby certify that C. C. Mast, whose name is signed to the foregoing certificate, is, and was on the 13th day of April, 1870, the date thereof, register of deeds in and for the county of Leavenworth, and State of Kansas; and that said attestation is in due form and by the proper officer.

Given under my hand this 30th day of April, 1870.

H. W. IDE, *Judge.*

(Endorsed:) 107. Edward S. Brown vs. Benajah W. Hiatt & Martha Ann Hiatt. Copy of Kenyon's mortgage and the assignment to Edward S. Brown. Filed by pl't'ff May 3d, 1870. A. S. Thomas, clerk.

And now, on this day, to wit, the 3rd day of May, 1870, came the plaintiff, by his solicitor, and filed in the said clerk's office a "Copy of judgment against Perkins, & of its assignment to E. S. Brown,"
168 which copy, together with the endorsements thereon, is in the words and figures following, to wit:

Be it remembered that, at the May term, 1859, of the district court of the United States for the district of the Territory of Kansas, commencing the 2 May, 1859, and continued and held thereafter on the 6 June, 1859, the following, among other proceedings, were had:

B. W. HIATT
vs.
GEORGE W. PERKINS. } 651.

Now comes the plaintiff, by his attorneys, Delahay, Dugger & Gallagher, and the said def't failing to demur or answer to the petition of the plaintiff filed in this cause, therefore it is considered by the court that the said plaintiff ought to recover the amount due him by reason of the premises; and the court, with the consent of the said plaintiff, find that there is due from the said defendant to the said plaintiff the sum of seven hundred and sixty-three dollars and thirteen cents on the note in the said petition set forth.

169 It is therefore considered by the said court, that the said plaintiff have and recover of the said defendant the said sum of

seven hundred and sixty-three dollars and thirteen cents, the sum found due as aforesaid, and all costs in his behalf expended; and it is further ordered and adjudged that, in case the said defendant fails, for ten days from the close of this term of the court, to pay to the said plaintiff the said sum of seven hundred and sixty-three dollars and thirteen cents, so as aforesaid found due, with all costs of suit, an order issued to A. F. Callahan, a master commissioner of this court, commanding him to cause the said lands and tenements in said petition described, to wit, lot No. (20,) twenty, in block No. (15,) fifteen, in the city of Leavenworth, county of Leavenworth, and Territory of Kansas, to be appraised, advertised, and sold according to law, and apply the proceeds of said sale to the satisfaction of said judgment so as aforesaid rendered, and to pay the overplus, if any, after the satisfaction of the same, to the said defendant.

170 The judgment aforesaid was, afterwards, to wit, on the 29th May, 1860, assigned to Edward S. Brown by an entry on the records of the abstracts of judgments of said court, which assignment is in words and figures, to wit:

"MAY 29TH, 1860.

"For value received, I hereby assign, transfer, and set over to Edward S. Brown the within judgment.

"Dated this 29th day of May, A. D. 1860.

"BENAJAH W. HIATT.

"Attest:

"JAMES R. WHITEHEAD, *Clerk*,

"By JNO. E. BLAINE, *D. C.*"

STATE OF KANSAS,

Leavenworth County, ss:

I, H. J. Dennis, clerk of the district court of the first judicial district of the State of Kansas, sitting within and for said county, do hereby certify that the above and foregoing is a full, true, and complete copy of the judgment rendered in the therein entitled cause, and of the assignment of said judgment to Edward S. Brown, as the same appears of record in my office.

In testimony whereof I have hereunto set my hand, and affixed
171 the seal of said court at my office in the city of Leavenworth, this 13th day of April, A. D. 1870.

[SEAL.] H. J. DENNIS,
Clerk of said Court.

[5-c'ts rev. st.]

STATE OF KANSAS,

County of Leavenworth, ss:

I, H. W. Ide, judge of the district of the first judicial district of the State of Kansas, sitting within and for said county, do hereby certify that H. J. Dennis, whose name is signed to the foregoing certificate, is, and was on the date thereof, clerk of said court, and that said attestation is in due form, and that, as such clerk, he is keeper of the records of the late district court of the United States for the Territory of Kansas which sat in and for the county of Leavenworth in said Territory.

Given under my hand this 30th day of April, 1870.

H. W. IDE, *Judge.*

(Endorsed:) 107. Edward S. Brown vs. Benajah W. Hiatt &
172 Martha Ann Hiatt. Copy of judgment against Perkins, & of its assignment to E. S. Brown. Filed by pl'ff May 3d, 1870. A. S. Thomas, clerk.

And on this day, to wit, the 3rd day of May, A. D. 1870, came the plaintiff, by his solicitor, and filed in the said clerk's office the "Deposition of H. T. Green, taken by consent 30th April, 1870," which deposition, together with the endorsements thereon is in the words and figures following, to wit:

In the circuit court of the United States for the district of Kansas.

EDWARD S. BROWN
vs.
B. W. HIATT AND MARTHA ANN HIATT.

The deposition of H. T. Green, taken at Leavenworth, on the 30th April, 1870, by consent of parties, to be read as evidence in the above-entitled cause, as if taken regularly on notice and commission.

HENRY T. GREEN, being first duly sworn, the witness deposeth as follows:

173 In 1860, Edward S. Brown sent certain circulars into Kansas as to his having money to loan; that, before said Brown arrived in the city of Leavenworth, and while he was in Atchison City, Kansas, Benajah W. Hiatt, knowing that I was acquainted with Edward S. Brown, applied to me to assist him in procuring a loan of two thousand dollars of the said Brown; that said Hiatt requested me to go to Atchison to see said Brown and secure the money; that the funds of said Brown might be loaned out, and the said Hiatt be unable to get the sum desired; that I was directed to inform said Brown that the sum which might be borrowed would be secured by mortgage on three hundred and twenty acres of land in Leavenworth County, on which the said Hiatt resided, and was improved and being farmed; that said Hiatt gave me a reason for desiring me to attend to the loan that he was not acquainted with said Brown, whereby said Brown proposed to loan some twenty thousand dollars, in Kansas, on improved farms; that,
174 in pursuance of the request of the said Hiatt, the undersigned went to Atchison and saw Mr. Brown at the Massissoit Hotel, and made the request, and delivered the foregoing statement of Hiatt, and learned the time the said Brown would come to Leavenworth City, and could be seen at the Plant'rs' Hotel; that I returned to Leavenworth City soon after, saw Hiatt and told him when Brown would be in Leavenworth; that about the appointed time, Hiatt, who lived some fifteen miles west of Leavenworth, came to this city, and I introduced Hiatt to said Brown; some conversation ensued as to the loan and the securities; that, a few days after this introduction, I again met Hiatt and his wife in the city of Leavenworth, who had come into the city to get the money, and execute the mortgage on the land. My best recollection is that they, Hiatt and wife, came to my house in the forenoon and we went immediately to the Planters' Hotel, where we met Mr. Brown, and the loan was effected and the mortgage was executed in said hotel; my recollection is distinct that it was in the Planters'
175 Hotel, at Leavenworth City, Kansas, that the papers were delivered and the loan effected; that said Hiatt, so soon as said loan

was effected, paid me my expenses in going to Atchison to see said Brown. I know from both said parties that the land, Kenyon's note and mortgage, and the judgment against Perkins were securities for payment of Hiatt's bond, given to said Brown for said loan, and never heard, although during the time I had frequent conversations with said Hiatt, anything about any agreement between them that said Brown was to take any of said securities in satisfaction of the bond for said loan until long after the confiscation suits had been instituted; that, about October, 1865, the said Edward S. Brown again came from the State of Virginia into Kansas, and brought with him to my house a large bundle of notes and mortgages, which he had before the war taken for moneys loaned in the State of Kansas, and these bonds and mortgages, some thirty or forty in number, were left with me with
176 directions to look after the interests of said Brown, growing out of this loan made by him in this State; that among these bonds and mortgages were the note of John H. Kenyon and the mortgage to secure the same; that, about the early part of 1867, I was directed to sue the defendants herein, and while the bill was being prepared at my office in Leavenworth City, Kansas, the note and mortgage of Kenyon were taken from the above bundle, and since then I have not seen said note of Kenyon, and had no occasion to look after it until October, 1868. Mr. Brown again came to Kansas, when I was called upon for these bonds and mortgages by him, and upon my delivery thereof I found the note of John H. Kenyon was not with the mortgage in which I received it, *or was the bonds in the other mortgages held by me.* I made then a search for it in the places where these papers had been kept by me, and could not find it. This search was made at my residence, and also at my office; that since that time, and within the past few days, both Mr. Brown and myself have
177 made a diligent search for said note of Kenyon, and have not been able to find it. Said note has not been delivered by me to any one, nor within my knowledge has any one taken it from my office, and I do not know where said note is. The note above referred to, was a note for eight hundred mentioned in Kenyon's mortgage, and corresponded with the description thereof in said mortgage.

H. T. GREEN.

Subscribed and sworn to in my presence this 30th April, 1870.

{ NOTARY SEAL. } Z. E. BRITTON,
Notary Public for Leavenworth County, Kansas.

Notary fees 50, paid by pl't'ff.

It is agreed that the foregoing deposition or affidavit of H. T. Green shall, on the hearing in the case of Edward S. Brown vs. Benajah W. Hiatt and Martha Ann Hiatt, now pending in the circuit court of the United States for the district of Kansas, *shall* be read in evi-
178 dence as though it were a deposition regularly taken by a legally authorized officer on due notice and commission.

Given under my hand this 30th April, 1870.

H. GRISWOLD, *Solicitor for Def'ts.*
EDWARD S. BROWN, *Plaintiff.*

(Endorsed:) 107. Edward S. Brown vs. Benajah W. Hiatt & Martha Ann Hiatt. Deposition of H. T. Green, taken by consent 30th April, 1870. Filed by pl't'ff May 3, 1870. A. S. Thomas, clerk.

And on this day, to wit, the 3rd day of May, A. D. 1870, came the plaintiff, by his solicitor and filed in the said clerk's office "Deposition of Edward S. Brown, taken by consent 30th April, 1870," which deposition, together with the endorsement thereon, is in the words and figures following, to wit:

In the circuit court of the United States for the district of Kansas.

EDWARD S. BROWN
vs.
BENAJAH W. HIATT & MARTHA ANN HIATT.

179 This second deposition of Edward S. Brown is taken at Leavenworth City, in Kansas, the 30th April, 1870, by consent of parties by their counsel, to be read as evidence in the above-entitled cause as if taken regularly on notice and commission.

Being first duly sworn, EDWARD S. BROWN deposes as follows:

I have recently seen the depositions of B. W. Hiatt and Martha Ann Hiatt, filed in this cause. Mr. Hiatt in his deposition says that when the money was borrowed, at the date of the note, at his house at the dinner-table, I told him, "If you elect Abraham Lincoln, we Virginians will never let him take his seat;" and that this was the special reason for his making the statement to Judge Crozier which led to the confiscation suit. In regard to this statement I say positively that I never said to Mr. Hiatt, at any time, "If you elect Abraham Lincoln, we Virginians will never let him take his seat," nor anything of that import. I never entertained such an opinion. At the time of the loan to Mr. Hiatt I
180 had been absent from Virginia several weeks. When I left Virginia I think the nomination of Mr. Lincoln was not then anticipated. I am sure that I had heard no Virginian express the purpose of preventing him taking his seat if elected. I had never entertained any such purpose. I was not at Mr. Hiatt's at all at the date of the note or bond. I was carried there by Mr. Hiatt from Leavenworth City, his farm being about 15 miles distant, a few days before the 29th of May, 1860, to see his lands, with a view of getting me to make him a loan, secured by a mortgage on said lands. We got to his house about sunset—time enough for me to see the general character of the lands. Directly after breakfast, the next morning, Mr. Hiatt and myself started back in his buggy to Leavenworth City. As we returned I consented to let him have $2,000 00, to be secured by a mortgage on his lands, with Kenyon's note for $800, with the credit of $75 thereon, and the judgment against Perkins for $763 13, as collateral thereto. On the 29th of May, 1860, Mr. & Mrs. Hiatt came to Leavenworth City, at the Planters' House,
181 where I was stopping. The agreement as to the loan was closed. The bond and the mortgage were then executed and acknowledged. We went to the register's office and had the assignment written on the margin of the record of Kenyon's mortgage. And at the clerk's office, we had the assignment written of the judgment against Perkins. We delivered Hiatt's mortgage to be recorded, and I gave them my sight check on Clark, Gruber & Co., in said city, for $2,000 00. I never took dinner at Mr. Hiatt's, and I was never there except as I have stated above. I again reiterate all that I said in my former deposition, especially that I received no letter from B. W. Hiatt after May, 1861, and wrote no letter to him after that time; that I never received from him any letter informing me that he had made his election for me to take

Kenyon's note and the judgment against Perkins in satisfaction of the bond of the def'ts to me; and never wrote any letter agreeing thereto; neither was there at any time agreement to that effect.

EDWARD S. BROWN.

182 Subscribed and sworn to in my presence this 30th April, 1870.

{ NOTARY SEAL. } Z. E. BRITTON,
Notary Public for Leavenworth County, Kansas.

Notary fees, 50 cts.; paid by pl'ff.

It is agreed that the foregoing deposition of Edward S. Brown shall, on the hearing in the case of Edward S. Brown vs. Benajah W. Hiatt and Martha Ann Hiatt, now pending in the circuit court of the United States for the district of Kansas, *shall* be read in evidence as though it were a deposition regularly taken by a legally-authorized officer, on due notice and commission.

Given under our hands this 30th April, 1870.

H. GRISWOLD, *Solicitor for Def'ts.*
H. T. GREEN, *For Pl'ff.*

(Endorsed:) 107. Edward S. Brown vs. Benajah W. Hiatt & Martha Ann Hiatt. 2 deposition of Edward S. Brown, taken by consent 30th April, 1870. Filed by pl'ff May 3d, 1870. A. S. Thomas, clerk.

183 An on this day, to wit, the 30th day of May, 1870, the following deposition was filed in the said clerk's office, which deposition, together with the endorsements thereon, is in the words and figures following, to wit:

In the circuit court of the United States within and for the district of Kansas.

EDWARD S. BROWN
vs.
BENAJAH W. HIATT & MARTHA HIATT.

A. F. CALLAHAN states that he was the master commissioner who sold the property, viz, lot 15, in block 20, in Leavenworth, Kan., in the case of Hiatt vs. Perkins, in district court of Leavenworth County, on January 16, 1861, and that he struck off the property to Edward S. Brown. He says neither said Brown nor any one for him ever paid him the $1,000 bid for said lot. He says that, as in the order of sale, said Brown was represented as the assignee of the judgment. He made report of his sale, and allowed the sale to be confirmed to him without
184 receiving the money on said bid. The bid was made by A. M. Sawyer for said Brown. He was the attorney directing the sale, and procured the issuing of the order of sale. Said Callahan does not know whether said Sawyer had any authority to act for said Brown or not, or whether said judgment had in part been assigned to him. My fees for selling the property, which have been paid, were paid by Sawyer. Said Callahan says that said Brown was not present. Said Callahan does not know him, and whatever was done in the making of said sale was done under the direction of A. M. Sawyer, who professed to act as the attorney of said Brown.

A. F. CALLAHAN.

It is agreed that the foregoing may be read in evidence in this case in the same manner and for the same purpose as if it was in the form of a deposition, legally taken, of said Callahan.

May 26, 1868.

EDWARD S. BROWN,
By H. T. GREEN, *Solicitor.*
B. W. HIATT,
MARTHA ANN HIATT,
185 By H. GRISWOLD, *Their Solicitor.*

(Endorsed:) Brown vs. Hiatt et al. Callahan's deposition. Filed May 30, 1870. A. S. Thomas, clerk.

And on this day, to wit, the 30th day of May, 1870, came the defendants and plaintiff, by their solicitors, and filed in the said clerk's office their "agreement dispensing with copies, & allowing copies of papers in evidence," which agreement, together with the endorsements thereon, is in the words and figures following, to wit:

Circuit court U. S., district of Kansas.

EDWARD S. BROWN
vs.
BENAJAH W. HIATT & MARTHA ANN HIATT. } In chancery.

It is agreed that, on the hearing of this case, the orders of sale issued in the matter of "The United States against A Note for $800," in the district court of the United States for the State of Kansas,
186 the apprais'ment had thereunder, and the returns thereon, and the journal entry of said court, confirming a sale made under one of said orders of sale, may be read in evidence in *in* the same manner, to the same extent, and for the same purpose (and in other) as legally-certified copies thereof might be read; and should this case be removed to any other county, in any form or manner, or for any purpose, certified copies thereof may be filed for the same purpose, & with the same effect, as if filed before the hearing hereof.

H. T. GREEN, *Att'y Pl'ff.*
H. GRISWOLD, *Att'y for Def't.*

(Endorsed:) 107. Edward S. Brown vs. B. W. Hiatt, et al. Agreement dispensing with copies & allowing copies of papers in evidence. Filed May 30, 1870. A. S. Thomas, clerk.

The orders of sale issued in the matter of the United States against A Note for $800 in the district court of the United States, Kansas,
187 for the State, the apprais'ment had thereunder and the returns thereon, and the journal entry of said court, confirming a sale made under one of said orders of sale allowed in evidence by the above stipulation, are in the words and figures following, to wit:

THE UNITED STATES OF AMERICA,
District of Kansas, ss:

The people of the said United States, to the marshal thereof in and for the district aforesaid, greeting:

Whereas, at the October term, A. D., 1863, of the district court of the said United States in and for said district, to wit, on the 19 day of No-

vember of said year, it was ordered, adjudged, and decreed by said court that John H. Kenyon should pay into said court the sum of one thousand and thirty-seven dollars, ($1,037 00,) within three months from the date of said decree, with interest thereon from the date of said decree until paid, at legal rate, and that in default of said payment,
188 the following real estate, to wit, the southeast quarter of section thirty, (30,) in township nine (9) south of range twenty-one (21) east, in the county of Leavenworth, and State of Kansas, should be appraised, advertised, and sold, according to the laws of the State of Kansas, regulating sales under executions, by said marshal:

And whereas said period of three months has fully elapsed, and default has been made in the payment aforesaid:

These are, therefore, to command you that you cause said above-described real estate to be appraised, advertised, and sold according to the laws of the State of Kansas regulating sales under executions, and that you bring into said court, without delay, the proceeds of said sale, to abide the further order thereof.

You will make due return of this order of sale within sixty days from the date thereof.

Witness the Hon. Mark W. Delahay, judge of our said court,
189 at Topeka, in said district, this 27th day of May, A. D., 1864.

[SEAL.] C. J. HANKS, *Clerk*,
By E. E. CHESNEY, *Dept.*

(Endorsed:) Ex. No. 220. Gen. No. 152. U. S. D. C. district of Kansas, U. S. Note for $800. Kenyon. Order sale. Am't decree, $1,037 00. Int. from Nov. 19, '63. Clerk's cost on ex. 2 40. Ap. June 10, $2,200 00, July 18, 542 76 paid by Alfred B. Powell, owner of west half of said tract.

Received this writ on the 18th day of July, A. D. 1864, and, in obedience to the commands herein contained, caused the land herein described to be appraised and advertised for sale. On the 18th day of July, 1864, the day on which said land was advertised for sale, but before the time mentioned in the notice thereof, one Alfred B. Powell, who is a purchaser of the west half of the tract of land herein described, subsequent to the lien on which this judgment is based, paid me five hundred
190 and forty-two dollars and seventy-six cents, one-half of the amount of said judgment and interest, to apply on said judgment in said payment, and I thereupon discontinued farther proceedings under this execution.

THOMAS A. OSBORN,
U. S. Marshal.

Marshal's sale.

In the district court of the United States for the district of Kansas.

THE UNITED STATES
vs.
JOHN H. KENYON.

By virtue of an order of sale to me directed, issued out of said court in the above-entitled cause, dated the 27th day of May, 1864, I will, on the 18th day of July, A. D. 1864, between the hours of ten and eleven a. m. of said day, at the court-house door in the city of Leavenworth, Leavenworth County, Kansas, expose to public sale, the southeast quar-

ter of section thirty, (30,) in township nine, (9,) south of range twenty-one (21) east, in said county of Leavenworth, Kansas.

THOMAS A. OSBORN,
United States Marshal.

June 13th, 1864. Je 16, wtd.

191 Filed July 22d, A. D. 1864.

C. J. KANKS, *Clerk.*
By E. E. CHESNEY, *Dep't.*

We, James C. Wilson, Jehu Wilson, and Henry W. Wilson, citizens and householders of the county of Leavenworth, and State of Kansas, having been summoned by Thomas A. Osborn, U. S. marshal, and by him affirmed, to impartially appraise upon actual view, the southeast quarter of section thirty, (30,) in township nine, (9,) south of range twenty-one (21) east, in the county of Leavenworth, Kansas, do, upon actual view thereof, appraise said real estate, at the sum of twenty-two hundred dollars.

June 10, 1864.

JAMES C. WILSON.
JEHU WILSON.
HENRY W. WILSON.

The said James C. Wilson, Jehu Wilson, and Henry W. Wilson are disinterested householders of Leavenworth County, Kansas, and were, before making the above appraisement, by me affirmed to make
192 an impartial appraisement of the property above described, upon actual view thereof.

THO'S A. OSBORN,
U. S. Marshal.

JUNE 10, 1864.

[Rev. stamp.]

(Endorsed:) United States vs. Note for $800. Kenyon. No. 152. Apprais'ment. Filed June 16, 1864. C. J. Hanks, clerk, by E. E. Chesney, dep't.

THE UNITED STATES OF AMERICA,
District of Kansas, ss:

The President of the United States of America to the marshal thereof in and for said district, greeting:

Whereas, at the October term, A. D. 1863, of the district court of the said United States in & for said district, to wit, on the 19th day of November of said year, it was ordered, adjudged, and decreed by said court, that John H. Kenyon should pay into the said court the sum of one thousand & thirty-seven dollars, ($1,037 00,) within three
193 months from the date of said decree, with interest thereon from the date of said decree until paid, at legal rate, and that in default of such payment, the following real estate, to wit, the southeast quarter of section thirty, (30,) in township nine (9) south of range twenty-one (21) east, in the county of Leavenworth, & State of Kansas, should be duly appraised, advertised, & sold according to the laws of the State of Kansas, regulating sales under executions, by the aforesaid marshal:

And whereas, the said period of three months had fully elapsed, and default had been made by said John H. Kenyon in said payment, on the

27th day of May, A. D. 1864, whereupon a writ of "order of sale" was issued by the clerk of said court in due form of law, directed to said marshal to execute:

And whereas said writ was by said marshal duly returned on the 22 day of July, A. D. 1864, with an indorsement of his doings thereon duly written upon it, to wit, that he had, as commanded therein, duly
194 appraised, advertised, and offered for sale said real estate therein & above described, on the 18th day of July, A. D. 1864, whereupon one Alfred B. Powell, "a purchaser of the west ½ of the said real estate, subsequent to the lien on which this judgment & execution was based, came and paid to said marshal $542 76, one-half of the amount of this said judgment & execution, and that, therefore, he, the said marshal, discontinued further proceedings under said writ of order of sale or execution:"

And whereas it was thereupon further ordered, adjudged, and decreed by said court on the day of July, A. D. 1864, that the west ½ of the above described real estate, owned by said Alfred B. Powell, should be forever discharged and released from all and every lien or incumbrance created by or arising from the mortgage deed in the information in this cause filed, described, and the order and decree rendered by this court thereupon, on the 19th day of November, A. D. 1863, and that the
195 apprais'ment of the east ½ of the above-described real estate made under said original writ of "order of sale" should be set aside, and for naught held, and that an alias writ of order of sale should be issued by the clerk of said court, in due form of law, directed to said marshal, for the sale of said east ½ of said real estate, as aforesaid:

Now, therefore, you are hereby commanded to cause the east ½ of the southeast ¼ of section thirty, (30,) in township nine, (9,) south of range twenty-one (21) east, in the county of Leavenworth, and State of Kansas, to be duly appraised, advertised, and sold according to the laws of the State of Kansas regulating sales under executions, and that you bring the proceeds of such sale into this court to abide its further order, and that you make due return of this writ within sixty days from this date thereof.

Witness the Hon. Mark W. Delahay, judge of the said court, at Topeka, this 18th day of February, A. D. 1865.

ADOLPHUS S. THOMAS, *Clerk*,
196 [SEAL.] By E. E. CHESNEY.

(Endorsed:) U. S. district court, district of Kansas. Gen'l No. 152. U. S. vs. Note for $800 00. Kenyon. Alias order sale. Issued Oct. 24, 1864. Ret'able . No. 301. J. S. Emery, att'y.

Received the within writ on the 18th day of February, 1865, and, in obedience to the commands therein contained, I caused to be summoned, on the 24th day of February, 1865, Seaborn Jessup, N. W. Wilson, and J. D. Jessup, disinterested householders, residing in Leavenworth County, Kansas, who were by me duly sworn to impartially appraise the tract of land within described, to wit, the east half of the southeast quarter of section thirty, (30,) in township nine, (9,) south of range twenty-one (21) east, in Leavenworth Co., Kansas. Said valuation and appraisement by them made and to me returned, under their hands, is herewith returned; and, on the 1st day of March, 1865, I caused to be published in the Leavenworth Weekly Conservative, a weekly
197 newspaper published in said co. of Leavenworth, a notice (a copy of which is hereto annexed, marked "A") that I would, on the

31st day of March, 1865, between the hours of ten and eleven a. m. of said day, at the court-house door in Leavenworth County, Kansas, expose to public sale the property above described, (said notice was published in said newspaper for thirty days prior to said day of sale,) and I did, at the time and place mentioned in said notice, offer said tract of land at public sale, and sold the same to Isaiah George for the sum of six hundred and sixty-eight dollars, ($668 00,) his being the highest bid therefor.

THO'S A. OSBORN,
U. S. Marshal,
By M. WEIGHTMAN, *Deputy.*

"A."—*Marshal's sale.*

In the district court of the United States for the district of Kansas.

THE UNITED STATES }
vs.
JOHN H. KENYON. }

By virtue of an order of sale to me directed, issued out of said court in the above-entitled cause, dated the 24th day of October, 1864,
198 I will, on the 31st day of March, A. D. 1865, between the hours of ten and eleven a. m. of said day, at the court-house door in the city of Leavenworth, Leavenworth Co., Kan., expose to public sale the east one-half of the southeast ¼ of section thirty, (30,) in township nine (9) south, of range twenty-one (21) east, in said county of Leavenworth, Kansas.

THOMAS A. OSBORNE,
U. S. Marshal,
By M. WEIGH'MAN, *Dep't.*

Filed April 8, 1865.

A. S. THOMAS, *Clerk.*

UNITED STATES OF AMERICA,
State of Kansas, Leavenworth County, ss:

In the district court of the United States for the district of Kansas.

THE UNITED STATES }
vs.
JOHN H. KENYON. }

We, Seaborn Jessup, J. D. Jessup, and N. W. Wilson, disinterested householders, residing in Leavenworth County, Kansas, having been by Mathew Weightman, deputy U. S. marshal for the district of Kansas, duly summoned to appraise the property of John H. Kenyon in the above-entitled cause, after being sworn, do return that, upon actual view of said property, we find the same to be *to* the total value
199 and appraisement of one thousand , ($1,000,) the said property being described as follows *as follows*, to wit: The east ½ of the southeast ¼ of section thirty, (30,) in township nine, (9,) south of range twenty-one (21) east, in the county of Leavenworth, State of Kansas.

SEABORN JESSUP. [SEAL.]
N. W. WILSON. [SEAL.]
J. D. JESSUP. [SEAL.]

FEB. 24TH, A. D. 1865.

STATE OF KANSAS,
Leavenworth County, ss:

I hereby certify that the within-named Seaborn Jessup, J. D. Jessup, and N. W. Wilson are disinterested householders, residents of Leavenworth County, in said State, and were by me duly summoned and sworn to value and appraise the within-described property this the 24th day of Feb., 1865.

THO'S A. OSBORN,
U. S. Marchel.
By M. WEIGHTMAN, *Dep'ty.*

(Endorsed:) U. S. dist. court, dist. of Kansas. Gen'l No. 152. Valuation & appraisement of property. United States vs. John H. Kenyon. Filed April 8th, 1865. A. S. Thomas, clerk.

200 At a term of the district court of the United States of America in and for the district of Kansas, began and held at the city of Topeka, in said district, on Monday, April 10th, A. D. 1865, there were present Hon. Mark W. Delahay, judge of said court.

At which term of said court, on Friday, April 14th, 1865, among other proceedings, the following were had, and appear of record in words and figures following, to wit:

Confirmation of sale.

FRIDAY, *April 14th*, 1865.

THE UNITED STATES
vs.
NOTE FOR $800 00—KENYON. } 152. Information.

The marshal of the United States for the district of Kansas having returned into this court that, under and by virtue of an alias writ of order of sale, issued out of this court in the above-entitled cause October 24, 1864, caused to be 'praised, advertised, and sold, according to the commands of said writ, the following-described property, as fol-
201 lows, to wit: The east one-half of the southeast one-quarter of section thirty, (30,) in township nine (9) south, of range twenty-one (21) east, in Leavenworth County, Kansas, to Josiah George for the sum of six hundred and sixty-eight dollars, ($668 00,) on the 31st day of March, A. D. 1865.

Now comes the plaintiff, by James S. Emry, esq., United States attorney for said district, and moves the court to ratify and confirm said sale of the above-described property.

The court having heard said motion, and having carefully examined the proceedings of said apprais'ment and sale, and being fully satisfied of the regularity and legality of the same:

It is now, therefore, ordered, adjudged, and decreed by the court here that, in all things, the said apprais'ment and sale be, and it is hereby, approved and confirmed.

And on this day, to wit, the 30th day of May, 1870, came the
202 plaintiff and defendants, by their solicitors, and filed in the said clerk's office their "agreed statement," which statement, together with the endorsements thereon, is in the words and figures following, to wit:

In the circuit court of the United States, within for the district of Kansas.

EDWARD S. BROWN
vs.
BENAJAH W. HIATT & WIFE.

It is agreed that, at the May term, 1859, of the district court of Leavenworth County, in the State of Kansas, an action was pending in said court, in which Benajah W. Hiatt, defendant, was plaintiff, and George W. Perkins was defendant; that said action was brought to collect the note against said Perkins, mentioned in defendant's answer in this case, by foreclosing the mortgage given to secure the payment thereof, also mentioned in said answer; that, at said term of said court, to wit, June 6, 1859, said Hiatt recovered a judgment on said note against said Perkins for $763 13, that being the amount then due thereon, & for the
203 costs of suit; and that it was by said court further ordered and adjudged that if said Perkins should fail to pay said sum within ten days of the close of the term of the court, an order of sale should issue from said court to A. F. Callahan, a master commissioner of said court, commanding him to sell the lot in said mortgage mentioned, to wit, lot No. 20, in block number 15, in Leavenworth, (proper,) in said Leavenworth County.

It is further agreed that, on November 17, 1860, an order of sale was issued by the clerk of said court upon said judgment to said Callahan, commanding him to sell said premises; that, having caused the same to be duly appraised, the appraisal thereof being fourteen hundred dollars, and having duly advertised the time and place of sale, he, on January 16, 1861, in accordance with his advertisement, offered said premises for sale, and struck off the same to said Edward S. Brown, (plaintiff in this action,) and made return, in his report of said sale to said court, that he "then and there received for the same from Edward S.
204 Brown, (the assignee herein,) the bid of $1,000," which was the highest and best bid offered, and that at the December term of said court in the year 1861, said master having made report of his said sale to said court, the said sale was by said court confirmed.

It is agreed that the following is a copy of the advertisement of sale:

Master commissioner's sale.

B. W. HIATT
vs.
GEORGE W. PERKINS.

Pursuant to the command of an order for the sale of property in the above-entitled cause, issued out of the first district court of the Territory of Kansas, sitting in Leavenworth County, for the trial of causes arising under the laws of said Territory, for the use of Edward S. Brown, assignee, & to me directed, I will, on Wednesday, the 16th day of January, 1861, at the court-house door, in the city and county of Leavenworth, in the Territory of Kansas, between the hours of ten a. m. and four p. m. of said day, offer at public sale the following described
205 property, to wit, lot number twenty, (20,) in block number fifteen, (15,) in the city of Leavenworth, county of Leavenworth, and Territory of Kansas, with the appurtenances. To be sold as the

property of George W. Perkins, at the suit of B. W. Hiatt; appraised at $1,400. Terms cash.

A. F. CALLAHAN,
Master Commissioner of said Court.

SAWYER & BAILEY,
Plaintiffs' Attorney.

DEC. 15.

The foregoing is to be given in evidence on the trial of this action, in the same manner, for the same purpose, and to prove the same facts as might be done by a copy of the record in the case named, or certified copies of any of the proceedings referred to, but is not to be used in evidence in any manner or for any purpose, or to prove any fact when such copy would not be competent.

EDWARD S. BROWN,
By H. T. GREEN, *Solicitor.*
B. W. HIATT.
MARTHA ANN HIATT.
By H. GRISWOLD,
Their Solicitor.

(Endorsed:) Brown vs. Hiatt & wife. Agreed statement. Filed May 30, 1870. A. S. Thomas, clerk.

206 At a term of the circuit court of the United States of America in and for the district of Kansas, began and held at the city of Topeka, in said district, on Monday, May 23rd, 1870, there were present Hon. John F. Dillon and Hon. Mark W. Delahay, judges of said court.

At which term of said court, on Tuesday, May 31st, 1870, among other proceedings, the following were had and appear of record in words and figures following, to wit:

TUESDAY, *May 31st*, 1871.

EDWARD S. BROWN
vs.
BENAJAH W. HIATT & MARTHA ANN HIATT. } 107.

This cause came on to be heard on the amended bill of complainant, and the answer of defendants thereto and replication, and the testimony of said plaintiff and defendants, and was argued by counsel, and submitted to the court; whereupon the court took the same under
207 advisement until the next term of this court; until which time this cause is continued.

At a term of the circuit court of the United States of America in and for the district of Kansas, began and held at the city of Topeka, in said district, on Monday, November 28th, 1870, there were present Hon. J. F. Dillon and Hon. Mark W. Delahay, judges of said court.

At which term of said court, on Monday, November 28th, 1870, among other proceedings, the following were had and appear of record in words and figures following, to wit:

MONDAY, *November* 28, 1860.

EDWARD S. BROWN
vs.
BENAJAH W. HIATT & MARTHA ANN HIATT. } 107. In equity.

This cause coming on to be heard on the bill, answer, replication, ex-

hibits, and the arguments of counsel having been heard as well
208 for complainant as defendants, the court, on consideration, finds the issues in this case for complainant; the court finds that the said defendants executed and delivered to the said complainant the note and mortgage set forth in the bill of complaint as therein stated; that the said defendants are entitled to have credited on said note and mortgage the Kenyon note, less the note of seventy-five dollars ($75 00) which had been paid thereon by said Kenyon before the assignment of the same to the said complainant as collateral, as in the bill of complaint set forth. It is considered by the court that the complainant is entitled to an account of the money due him in the premises; and the court, after hearing the evidence, do find that there is due to the said complainant on the note and mortgage in the bill of complaint described, the sum of three thousand and thirty-seven dollars and fifty cents, ($3,037 50,) after deducting the amount due on the Kenyon note at the date of the confiscation of the same, as set forth in the answer
209 of the said defendants, being the sum of nine hundred and fifty-five dollars, ($955 00.)

It is therefore considered by the court here that the said complainant recover of the said defendants the said sum of three thousand and thirty-seven dollars and fifty cents, ($3,037 50,) the sum so found due as aforesaid, to have interest at the rate of twelve (12) per cent. per annum from the date of this decree, until paid; and also his costs taxed at—

It is further ordered, adjudged, and decreed that, in case the said defendants fail, for twenty days from the close of this term of the court to pay to the said complainant the said sum of three thousand and thirty-seven dollars and fifty cents, ($3,037 50,) so as aforesaid found due, with costs of suit, an order issue to the United States marshal for the district of Kansas, commanding him to cause the said lands and tenements in the bill of complaint described, to wit, the east half of section number twenty-two, (22,) in township number nine, (9,) range number
210 twenty, (20,) containing three hundred and twenty acres of land, (320 acres,) being in the county of Leavenworth, in the State of Kansas, to be appraised, advertised, and sold according to law, and apply the proceeds of said sale in satisfaction of the sum so found due, with costs of suit. And it is further ordered, adjudged, and decreed, that the said defendants, and each of them be, and they and each of them are hereby, forever barred from equity of redemption in and to said premises in case they fail to pay the sum so found due to complainant within the time above limited.

At a term of the circuit court of the United States of America, in and for the district of Kansas, began and held at the city of Topeka, in said district, on Monday, November 28th, 1870, there were present, Hon. John F. Dillon and Hon. Mark W. Delahay, judges of said court.

At which term of said court, on Wednesday, November 30th, 1870, among other proceedings, the following were had, and appear of
211 record in words and figures following, to wit:

EDWARD S. BROWN
vs. } 107.
BENAJAH W. HIATT & MARTHA ANN HIATT.

On the application of the defendants for an appeal from the final decree rendered in this action to the supreme court of the United States, and the amount in dispute in the action exceeding the sum of two

thousand dollars, it is ordered that the appeal, as claimed by the defendants, be allowed on their giving bond with one or more sureties, to be approved by the clerk of this court in the sum of five hundred dollars, conditioned that the defendants will prosecute their appeal to effects, and answer all damages and costs if they fail to make their appeal good, if any damages and costs shall be adjudged against them.

212 And on this day, to-wit, the 30th day of November, A. D. 1870, came the said defendants, by their solicitor, and filed in the said clerk's office their appeal bond in the above-entitled cause, which said bond, together with the endorsements thereon, is in the words and figures following, to wit:

Know all men by these presents that we, Benajah W. Hiatt and Nathan Harvey, are held and firmly bound unto Edward S. Brown in the sum of five hundred dollars, to be paid to the said Edward S. Brown, his certain attorney, executors, administrators, and assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals and dated this 30th day of November, in the year one thousand eight hundred & seventy.

213 Whereas lately at & in the circuit court of the United States for the district of Kansas, in a suit pending in said court between said Edward S. Brown, complainant, and said Benajah W. Hiatt & Martha Ann Hiatt, defendants, a decree was rendered against said defendants for the sale of certain real in the proceedings in said action mentioned, to pay a certain debt from them to said Brown, and for which, in said action, a decree was rendered against them for the sum of three thousand and thirty-seven $\frac{50}{100}$ dollars, from which an appeal has been allowed to the Supreme Court of the United States, to be holden at Washington:

Now, the condition of the above obligation is such, that if the said Benajah W. Hiatt & Martha Ann Hiatt, or either of them, shall prosecute said appeal to effect, and answer all damages and costs if they fail to make their appeal good, and any damages or costs shall be adjudged or decreed against them, then the above obligation to be void; else to remain in full force and virtue.

NATHAN HARVEY. [SEAL.]

Approved by—

A. S. THOMAS,
Clerk of the Circuit Court of the United States
for the District of Kansas.

214 (Endorsed:) No. 107. Edward S. Brown vs. Benajah W. Hiatt & Martha Ann Hiatt. Bond. Filed Nov. 30, 1870. A. S. Thomas, clerk.

215 UNITED STATES OF AMERICA,
District of Kansas, ss:

I, A. S. Thomas, clerk of the circuit court of the United States for the district of Kansas, do hereby certify the foregoing transcript to be a true, full, and perfect copy from the record of all the proceedings had in said court in the case of Edward S. Brown, complainant, vs. Benajah W. Hiatt & Martha Ann Hiatt, defendants, as the original of the survey now remains in my custody.

In testimony whereof I have hereunto set my hand and affixed the

seal of said court, at my office in Topeka, in said district of Kansas, this 29th day of March, A. D. 1871.

[SEAL.] A. S. THOMAS, *Clerk.*

[5-c't int. rev. stamp canceled.]

216 The United States of America to Edward S. Brown:

Whereas Benajah W. Hiatt and Martha Ann Hiatt have lately appealed to the Supreme Court of the United States from a decree lately rendered in the circuit court of the United States for the district of Kansas, in the ninth circuit, made in favor of you, the said Edward S. Brown, against them, the said Benajah W. Hiatt & Martha Ann Hiatt, and have filed the security required by law:

You are therefore cited & admonished to be and appear at and before the Supreme Court to be holden at Washington, on the first Monday of December next, pursuant to, and to answer to, said appeal, and to do and receive what may appertain to justice in the premises.

Witness the Honorable Mark W. Delahay, one of the justices of the circuit court of the United States for the district of Kansas, in the ninth circuit, this 4th day of April, 1871.

MARK W. DELAHAY,
Associate Justice of the U. S. Circuit Court for the District of Kansas.

217 UNITED STATES OF AMERICA,
District of Kansas, ss:

Hiram Griswold, of lawful age, being duly sworn, says that, on the 4th day *day* of April, 1871, at the district aforesaid, he served the within citation on H. P. Green, one of the counsel of record for the withinmentioned Edward S. Brown by delivering to him personally a true copy thereof.

HIRAM GRISWOLD.

Sworn to before me & subscribed in my presence this 4th day of April, 1871.

Z. E. BRITTON,
U. S. Com'r for the Cir. Court for Dist. of Kansas.

(Indorsement on cover:) No. 542. Benajah W. Hiatt and Martha Ann Hiatt, appellants, vs. Edward S. Brown. Kansas C. C. U. S. Filed 24th May, 1871.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the district of Kansas, greeting:

[SEAL.]

Whereas in a certain suit in said circuit court between Edward S. Brown, complainant, and Benajah W. Hiatt and Martha Ann Hiatt, defendants, which suit was removed to the Supreme Court of the United States, by virtue of an appeal, agreeably to the act of Congress in such case made and provided, a diminution of the record & proceedings of said cause has been suggested, to wit:

"That the transcript of the record filed in this court does not contain the deposition of John H. Kenyon, which was read at the hearing in the court below."

2 You therefore, are hereby commanded that, searching the records and proceedings in said cause, you certify what omissions and errors you shall find, to the said Supreme Court of the United States, so that you have the same, together with this writ before the said Supreme court forthwith.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court, the first Monday of December, A. D. 1871.

D. W. MIDDLETON,
Clerk Supreme Court, U. S.

Issued 20 November, 1872.

3 (Indorsed:) No. 314, Sup. Court U. S. December term, 1871. Benajah W. Hiatt et ux., app'ts, vs. Edward S. Brown. Certiorari.

4 Before the Hon. John T. Dillon and Hon. Mark W. Delahay, judges of the circuit court of the United States in & for the district of Kansas, in chancery sitting, at a term of said court, begun & held at Topeka on the 26th of Nov., 1872.

EDWARD S. BROWN, PLAINTIFF,
vs.
BENAJAH W. HIATT & MARTHA ANN HIATT, defendants. } 107

Be it remembered that, on the 28th day of Nov'r, 1872, came the plaintiff & presented the certiorari from the Supreme Court of the United States in the appeal taken by the defendants, Benajah W. Hiatt & Martha Ann Hiatt, & on leave of the court, filed in this cause the following affidavits, on which the following proceedings were had:

I, A. S. Thomas, clerk of the circuit court of the United States for the district of Kansas, do depose and say that the deposition of John H. Kenyon was on file and read on the hearing of the case of Edward S. Brown, plaintiff, against Benajah W. Hiatt & Martha Ann Hiatt,

5 defendants, in said court; that when my attention was called to the omission of said deposition from transcript of the record in said case, I made diligent search for it, and cannot find it. It has been, by some means unknown to me, lost from the files. What became of it I do not know. Given under my hand this 27th day of November, 1872.

A. S. THOMAS, *Clerk.*

Subscribed and sworn to before me by A. S. Thomas this 28th day of November, 1872.

I. H. C. ROYSE,
U. S. Cir. Court Commissioner for Dist. of Kansas.

(Endorsed:) No. 107. Edward S. Brown vs. Benajah W. Hiatt & Martha Ann Hiatt. Affidavit of A. S. Thomas, clerk, Filed Nov. 28, 1872. A. S. Thomas, clerk.

Statement of John H. Kenyon's deposition.

I reside near Indianapolis, in the State of Indiana. I formerly resided in Leavenworth County, Kansas, and moved from there in the fall of 1862. On my note of $800.00 to B. W. Hiatt, I had paid
6 $75.00 before its assignment to Edward S. Brown. I know B. W. Hiatt very well, and we had frequent conversations about my note, which had been assigned to Edward S. Brown. I asked him several times if he had heard anything from Edward S. Brown, and he invariably answered that he had not. He said Brown was in the South, and that he would not be able to correspond with him. I understood from him that he said that he had had no correspondence with Edward S. Brown after the commencement of the war. I never heard from him anything about my note for $800.00 being taken by said Brown in payment of Hiatt's bond to him, but I understood that said note was held as additional security along with the mortgage on Hiatt's land, for the payment of Hiatt's bond to said Brown. I am not aware of anything else which I suppose would be material evidence in this case."

I, John H. Kenyon, do depose & say the above is a true & correct statement of my deposition given in 1870, to be read as evidence in a suit pending in the circuit court of the United States for the district of Kansas, in which Edward S. Brown is plaintiff & Benajah W.
7 Hiatt & Martha Ann Hiatt are defendants, which deposition I am informed is lost or mislaid, and the foregoing statement is made to supply the same. This statement, I know, truly gives the substance, and I believe the exact language of my deposition.

Given under my hand this 22nd Nov., 1872.

JOHN H. KENYON.

STATE OF INDIANA,
Marion County, set:

Solemnly affirmed to and subscribed before the undersigned, a notary public in & for said county.

In witness whereof I have hereunto affixed my hand and notarial seal. Done at the city of Indianapolis, in Marion County, & State aforesaid, this Nov. 22d, A. D. 1872.

[SEAL.]

JACOB P. DUNN,
Notary Public.

(Endorsed:) No. 107. Edward S. Brown vs. Benajah W. Hiatt & Martha Ann Hiatt. Paper "K," referred to in affidavits. Filed Nov. 28, 1872. A. S. Thomas, clerk.

I, Edward S. Brown, do depose & say that, in the year 1870, at Indianapolis, in the State of Indiana, in pursuance of a commission
8 duly issued, & notice duly given, I took the deposition of John H. Kenyon, to be read on my behalf in a suit in equity pending

in the circuit court of the United States for the district of Kansas, in which I am plaintiff, and Benajah W. Hiatt & Martha Ann Hiatt are defendants. Said deposition was duly taken and sent by mail to the clerk of said court. While it was being taken, and before it was sealed up, I took a rough pencil-copy of it, omitting the caption and certificate.

In the appeal taken by the defendants I was surprised at finding that Kenyon's deposition was omitted from the printed record, & I obtained a writ of certiorari. On inquiry of the clerk, I was informed that the original deposition of Kenyon was lost and could not be found.

The paper, marked "K," signed by John H. Kenyon, & verified by his affidavit, is copied from the pencil-copy which I made at the time his deposition was taken, and I know it to be a true & correct copy.

Given under my hand this 26th day of Nov., 1872.

EDWARD S. BROWN.

Subscribed & sworn to before me, in my office, this 28th day of November, 1872.

[SEAL.] A. S. THOMAS.

9 (Endorsed:) No. 107. Edward S. Brown vs. Benajah W. Hiatt & Martha Ann Hiatt. Affidavit of Edward S. Brown. Filed Nov. 28, 1872. A. S. Thomas, clerk.

We, Wilson Shannon & H. T. Green, do depose & say, that we, as counsel for Edward S. Brown, plaintiff in a suit in equity against Benajah W. Hiatt & Martha Ann Hiatt, in the circuit court of the United States for the district of Kansas, argued the case on final hearing; that the deposition of John H. Kenyon was read on the hearing; that we have read the paper, marked "K," verified by John Kenyon's affidavit, on the 22 Nov., 1871, and, from our recollection and knowledge of said deposition, we do verily believe that paper "K" is a true & and correct statement of the contents thereof.

Given under our hands this 27th day of November, 1872.

H. T. GREEN.
WILSON SHANNON.

Subscribed & sworn to before me, in my office, by H. T. Green & Wilson Shannon this 28th day of November, 1872.

[SEAL.] A. S. THOMAS, *Clerk.*

10 (Endorsed:) No. 107. Edward S. Brown vs. Benajah W. Hiatt & Martha Ann Hiatt. Affidavit of Wilson Shannon & H. T. Green. Filed Nov. 28, 1872.

A. S. THOMAS, *Clerk.*

EDWARD S. BROWN
vs.
BENAJAH W. HIATT & MARTHA ANN HIATT. } 170. In equity.

This day the plaintiff in the above-entitled cause presented to the court a writ of certiorari, issued the 20th day of Nov'r, 1872, from the Supreme Court of the United States in an appeal by the defendants in this cause to said court, on a suggestion diminution of the record, in this, that the transcript of the record in this cause filed in said court does not contain the deposition of John H. Kenyon, which was read at the hear-

ing in the court below; and, on motion of the plaintiff, leave is given him to file the affidavits of A. S. Thomas, clerk of this court; Wilson Shannon and H. T. Green, counsel who argued this cause at the hearing; Edward S. Brown, the plaintiff; and a paper marked "K," signed by John H. Kenyon, & verified by his affidavit; all of which are
11 filed accordingly, and was argued by counsel: On consideration whereof the court finds from the evidence that the original deposition of John H. Kenyon, read on behalf of the plaintiff on the hearing of this cause, has been lost from the files, and cannot be found; and the court further finds from the evidence, and the recollection of the court accords therewith, that paper "K" is a correct & true statement of the contents of the original deposition of John H. Kenyon, read on the hearing of this cause; and the court doth order that the clerk of this court, do transcribe & certify said paper "K," said affidavits, & the proceedings of this court thereon, & return the same in obedience to the writ of certiorari to the Supreme Court of the United States.

12 UNITED STATES OF AMERICA,
District of Kansas, ss:

I, A. S. Thomas, clerk of the circuit court of the United States of America, for the district of Kansas, do hereby certify the foregoing to be a true, full, and perfect copy of the affidavit, paper "K," therein referred to, and the proceedings of the court supplying the deposition of John H. Kenyon, which has been lost from the files, in the case of Edward S. Brown, plaintiff, vs. Benajah W. Hiatt & Martha Ann Hiatt, defendants, all of which are now transcribed, certified, & returned to the Supreme Court of the United States, in obedience to the writ of certiorari hereto attached; and I do further certify that these additional proceedings together with the transcripts heretofore sent is a true, full, & perfect copy of the record of said case, without omission, as the same now appear & remain in my custody.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office in Topeka, in said district of Kansas, this 29 day of Nov'r, A. D. 1872.

[SEAL.] A. S. THOMAS, *Clerk.*

(Indorsed:) Supreme Court, U. S. 1872, Dec. term. No. 95. Benajah W. Hiatt & al., app'ts, vs. Edward S. Brown. Certiorari & return. Filed 3d December, 1872.

Supreme Court of the United States.

DECEMBER TERM, 1872.

HIATT & HIATT vs. BROWN.....No. 92.

BROWN vs. HIATT & HIATT.....No. 532.

CROSS APPEALS FROM THE CIRCUIT COURT OF KANSAS DISTRICT.

BRIEF AND POINTS FOR THE HIATTS.

The Transaction.

Brown, a citizen of Virginia, went to Kansas to loan money and receive the benefit of laws of that State, which legalized an abominable interest. He loaned Hiatts $2,000, and took their bond and mortgage for $2,400, due one year from date, which matured May 29th, 1861.

And as collatterals, a note and mortgage for $800, of one Kenyon, dated December, 1858, and a judgment against one Perkins for $763, rendered in June, 1869. Both were assigned to him.

Brown returned to Virginia before the maturity of the note and commenced the suit in February, 1867.

In the meantime the war intervened and subsided, during which an effort was made to collect the Perkins judgment, which developed its worthlessness. Also, in 1863, the Kenyon note and mortgage were confiscated as the property of Brown.